Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARK B. RASMUSSON, et. al.,

Petitioners,

v.

LAWRENCE E. FROST, et. al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX H
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON	§	
RASMARK JET CHARTER, INC.,	§	
	§	CIVIL ACTION:
PLAINTIFFS,	§	
	§	EP-95-CA-475-F
VS.	§	
	§	
LAWRENCE E. FROST, ET AL.,	§	
	§	
DEFENDANTS.	§	

AFFIDAVIT OF ANDREW A. GANTKESSY

STATE OF TEXAS
EL PASO COUNTY

On this day personally appeared ANDREW A. GANTKESSY who after being duly sworn stated upon his oath and belief as follows:

1 . "My name is ANDREW A. GANTKESSY, I am over the age of 21 years, and I am competent in all ways to make this oath and affidavit. I have personal knowledge of the facts and circumstances set forth below.

2. "1 have read the Application and Affidavit for Search Warrant that was prepared by Agent Lawrence E. Frost on November 19, 1993, for the Rasmusson residence located at 11157 Leo Collins Drive, El Paso, Texas and the search warrant Application and Affidavit for the Rasmark office located at 6805 Boeing. The Frost Affidavit imputes certain statements to me on page 19(see App. 936, paras 95-100) of the Leo Collins Affidavit and these statements are repeated on pages 17-18 in the Boeing Affidavit (see App. 936, paras 95-100).

3. "On pages 12-13 (see App. 928, paras 57-62) of the Leo Collins affidavit, Agent Frost alleges that officer Gongaware observed a large yellow truck with Chihuahua plates blocking the airport entrance and he investigated. Large yellow trucks with Chihuahua plates entering the airport and proceeding to the Rasmark ramp area was a common occurrence where the auto parts on the trucks was made in Mexico and had to transported from Mexico to the Airport for shipment to the auto manufacturing plant.

4. "On page 13-14 (see App. 929, paras 63-65) of the Leo Collins affidavit, Agent Frost states that on March 1, 1993, Officer DeAngelo stated that he observed the loading of a jet at Rasmark with guards armed with a rifle, posted towards the main airport area and another guard with a rifle posted to watch the south towards Boeing St. Agent Frost states that this event took place on July 24, 1992.

5. "The month of July in 1992 was one of our busy times due to closing out the years models and making final productions runs. While in my job at the Ford Motor Company Favesa warehouse, I frequently would be required by Ford Motor Company assembly plants to utilize Rasmark per their specific request because Rasmark had a strong reputation at Ford of delivering the parts on time.

6. "Often I was at the Rasmark hanger, ramp personally supervising the loading of the aircraft with Ford parts at one and two o'clock in the morning. There was never any guards or security personnel or anyone posted with a rifle on the Rasmark loading area or any where near the Rasmark offices. Had I observed a person with a rifle any where close to the Rasmark hanger, aircraft, or on our loading area, I would have called the police immediately.

7. "In 1991, I was required by Ford Executive manager, Mr. Robert Card, to send a form letter to all potential jet carriers in the El Paso area including Aero, Freight. The purpose of the letter was to question each potential carrier as to their rates and other important matters such as "as soon as possible service" for jet carriers. Rasmark was the only company that provided Ford with all information that Ford requested without requiring Ford sign a contract for services, I was

specifically ordered by Mr. Mr. [sic] Card through Mr. Sal Pianello and Mr. Carl Peugh to use Rasmark as our carrier in El Paso exclusively and Mr. Card stated that Rasmark was number 1 with Ford. This is exactly what I did until mid 1993 when Ford ordered that Active Aero would be Ford's primary jet carrier.

8. The Leo Collins Affidavit at page 19(see App. 936, para 95) states that Customs Agents Schroeder, and Larry Brown, Detective Holland and FBI agent Acosta invaded my office. There were seven of them including Agent Frost. These agents started firing questions at me and I told them that I wanted to speak to my attorney. They told me that if [sic] wanted an attorney that they were going to arrest me. The agents made many statements that I told them were not true but they refused to listen and continued to intimidated me to the point that I merely agreed with whatever they said. At the conclusion of each statement they made, I said well if you say so. The agents told me if I did not say what they wanted they would arrest me. I became ill as a result of the agents threats and I had to leave work to go to my doctor. See Exhibits AG-1 through AG-4 (see App. 331), which is my statement made on August 19, 1993, AG-7, AG-10, AG-12 (see App. 1304), and AG-19(see App. 1305) attached hereto. hereto [sic] are from my file pertaining to my claim against Ford for age discrimination. The Documents AG-12 through AG-20(see Apps. 331, 332, 1304, 1305) were received by me from the Ford Motor Company and each document has a Ford number. For example AG-12 has the Ford number F1000394. Exhibits AG-7 through AG-11 are portions of a document that I prepared for my attorney. This document contains portions of information that pertain to Rasmark, the threats by the agents made against me and other matters relative to my age discrimination complaint.

10. [sic] The worst threat came the day after the agents came to my office. They made me go to their office under threat of arrest if I refused. At their office, they wanted me to wear a wire and get evidence against Rasmark. They said, "we'll tell you what questions to ask." I refused to wear the wire or to entrap anyone. The agents threatened me that they would cause me to lose my job and my pension if I refused to do what they ordered. Agent Frost and the others made good on their threats they caused Ford to fire me and I lost my pension because of the

lies about me they told Ford investigators."

SIGNED ON THIS 17 th DAY OF JULY, 1996.

/s/ Andrew A. Gantkessy
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, THE UNDERSIGNED AUTHORITY, ON THIS 17th DAY OF JULY, 1996.

/s/_____
NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS
MY COMMISSION EXPIRES: 8-21-96

[Paragraph numbers added to text}

AFFIDAVIT OF ANDREW A. GANTKESSY

OCTOBER 3, 1996

I, Andrew A. Gantkessy, make the following free and voluntary statement to Hank Webb and Edward Wagner at El Paso, TX on Oct. 3, 1996.

I reside at 457 El Camino, El Paso, TX 79912.

1. I was employed by Ford Motor Co. for approximately 24 years until I was terminated in October 1993. I believe I was fired by Ford as a direct result of false information which was furnished about me to Ford Motor Co. by Larry Frost and other U.S. Customs officers, including El Paso Special Agent in Charge, Michael Lappe. During the 24 years which I worked for Ford, I had an outstanding employment record which included numerous commendations, outstanding performance ratings and no suspensions or reprimands.

2. The false information furnished to Ford was obtained in the following manner. In June 1993, I was working at my office in El Paso. I was informed that a US Customs officer was at the security door and wished to speak to me. He had not made a prior appointment and I assumed that one of our trucks might have had a problem crossing the bridge into the US from Mexico. When I went to the security door to meet the officer, I was confronted by five or six federal agents and one El Paso police officer. I was taken to a conference room in the building where all the agents started to interrogate me. I asked that my supervisor be allowed to come onto the room but Larry Frost, who seemed to be in charge, denied my request.

3. Frost started to question me in a very aggressive manner, sometimes shouting and using profanity. Within a few minutes I became very upset and frightened. I asked permission to call my wife and to call an attorney. I was told that if I got out of the chair in which I was sitting,

I would be arrested, handcuffed, and "dragged out of the building in full view of the other employees." The agents continued to question me non-stop for several minutes about Mark and Debbie Rasmussen. They also accused me of accepting money and free transportation from the Rasmussens. They claimed that I had received up to $5,000.00 kickback for all flights booked with Rasmark Air Charter. This was not possible since most of the flights cost less that $5,000.00 total. For several minutes I denied all the accusations being made against me by the agents.

4. After a while I started to feel sick. I was under a Doctor's care at the time being treated for a heart condition. I had triple by-pass heart surgery in 1987 and had a stroke in May 1990. I was afraid that I was about to have another heart attack. In order to get out of the room, I finally told the agents that I would-agree to anything they said. Once I said that and stopped denying their accusations, I was allowed to leave the room. Any admissions I made during the last few minutes with the agents were made out of fear and intimidation and were not true. I was feeling sick and went directly home. My wife drove me to my Doctor either that afternoon or first thing the next morning. Before the agents released me, I was ordered to report to the US Customs office on Viscount Blvd. the following day. I was told that if I failed to show up at the Customs office, I would be arrested.

5. The following day I went to the Customs office where I was met by Customs Agent Fred Schroeder and FBI Agent Joe Acosta. We went to a small room and Agent Schroeder started to ask questions. He asked me several questions about Mark and Debbie Rasmussen. I told him that I was not aware of any illegal activities on the part of either Mark or Debbie or any employee of Rasmark Air Charter.Schroeder asked me if I would be willing to wear a "wire" and record conversations with the Rasmussens. I told him that I would think about it and give him an answer the next day. He also asked by to make a phone call from his office to Mark Rasmussen and allow him, Schroeder, to record the call. He told me that he would tell me what to say. I refused to make the phone call. Before allowing me to leave the Customs office, Agent Schroeder again made threats against me, telling me that I would lose my job and go to jail if I refused to cooperate with

him and the other agents. He assured me that if I cooperated,, nothing would happen to me.

6. The following day, I went to a lawyer, Mr. Tony Silva, and told him what had happened. He instructed me to refuse to wear the wire and refuse to cooperate with any of the federal agents. When I called Schroeder and told him that I would not wear the wire, he seemed very upset. He told me that I was making a big mistake and that he and the other agents would start "playing hardball". I now realize that all the threats to arrest me made by the agents must have been a bluff since I was never contacted or bothered by the agents again. I do believe that after I refused to cooperate with them, the Customs agents, Larry Frost and others, furnished false information about me to my employer, Ford Motor Company which caused me to lose my job and my retirement.

7. I was first confronted by Ford Management officials about taking kickbacks and free transportation from Rasmark in October 1992. This meeting took place at the Ford Headquarters in Michigan. Present at the meeting were Tim Pomaville and Jim Lanni. I thought that I was going to be asked questions about the activities of Joe Sudomir who had been transferred out of El Paso. I was surprised when all the questions were directed towards me and my relationship with Rasmark Air Charter. From the text of the questions asked at that meeting and the questions asked by Larry Frost and the other agents, I now believe that Ford officials had been furnished false information about me by Frost or other Customs officers which led to the accusations made against me by my superiors. I was accused of accepting money and free transportation from Mark and Debbie Rasmussen. I denied all the allegations but I was told that if there were any more such allegations in the future, I would lose my job.

8. In August 1993 1 met again with Ford Management officials at FAVESA in El Paso at their request. Present at that meeting were my supervisor, Tim Lanni, Tim Pomaville, and two other management officials whose names I do not recall. They again accused me of taking kickbacks from Rasmark and receiving free transportation. Although there was no proof of any of the allegations and I denied all of them, I was suspended with pay after the meeting and I was terminated by Ford

in October 1993. The official reason given f or my termination was "for the good of the Company".

9. Prior to my being terminated by Ford, I was told by Bill Dumead, a Ford management official, that David Blair, another Ford manager, was in trouble for accepting free out of state golf outings. I do not know what happened, if anything, to Blair. I also knew that Bill Dumead accepted a free jacket from one of the carrier services which was a violation of Ford Company policy. George Powers and other FAVESA managers also received free back pack radios from W.H. Froh, one of the carriers used by Ford. These radios were used for both personal and business. This was also a violation of Ford policy.

10. I never accepted any money, free transportation, or other gratuity from Mark or Debbie Rasmussen or any other Rasmark employee. On one occasion, I loaned Debbie about $450.00 cash which she used to buy a gun as a birthday gift for Mark. She repaid me in cash the following day. once when we were in Las Vegas, Mark loaned me about $600.00 in poker chips. I did not use the chips and returned them to Mark the same night. On several occasions Rasmark sent a FAX to all the FAVESA employees offering trips on Rasmark aircraft at current airline rates. The trips did not include any tickets, money or other gratuities. The trips were usually to football games.

11. On the occasions when I flew on Rasmark aircraft, I always paid for my fare in cash. I determined the fare by calling one of the commercial airlines to obtain the amount. I then paid Debbie for the fare in cash. I deny ever accepting any cash or other gratuity from Mark or Debbie or any other Rasmark employee. I also deny that I ever accepted any "sexual favors" f rom Debbie Rasmussen or anyone else.

12. I never used Rasmark Charter unless I was authorized to do so by one of my superiors. The Rasmark freight rates were consistently lower that the other air carriers in the El Paso area and they provided more reliable service. There was never any double billing since this would not have been possible with the accounting voucher system used by Ford.

13. After I was fired by Ford, I applied for my retirement. I received three or four retirement checks and was then informed that my case had been reviewed and my retirement denied. I was forced to repay Ford for the retirement checks which I had received. I am convinced that my termination by Ford and the loss of my retirement benefits were directly related to the false information furnished to Ford by Larry Frost and Michael Lappe and possibly other federal agents. During the time when the agents were trying to force me to cooperate with them, they told me several times that if I refused to cooperate, they would see to it that I lost my job and my retirement. They apparently made good on their threats.

14. The information on which Ford based my termination was no doubt a result of my interrogation by Larry Frost and the other agents in June 1993. No written statement of my alleged admissions was ever shown to me. I seriously question the accuracy of the information which US Customs officers furnished to Ford management and which was later used as a basis to end my career with Ford. I can only assume that Frost and the other agents wrote the statement to suit their purposes and that they editorialized the contents. Unfortunately for me, I was never allowed to see a copy of the statement.

I have read the above statement consisting of this page and six other pages. The information contained in the statement is true and correct to the best of my knowledge.

Signed this 3rd day of October, 1996.

/s/ ANDREW A. GANTKESSY
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME, THE UNDERSIGNED AUTHORITY, ON THIS THIRD DAY OF OCTOBER, 1996.

/s/ Edward Wagner
NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS
My Commission expires: 9/29/99

/s/ Henry A. Webb
Witness

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FILED: August 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON	§	
RASMARK JET CHARTER, INC.,	§	
DEBORAH L. RASMUSSON,	§	CIVIL ACTION:
ANDREW A. GANTKESSY,	§	EP-95-CA-475-F
	§	
PLAINTIFFS,	§	
	§	
	§	
VS.	§	
	§	
LAWRENCE E. FROST, ET AL.,	§	

PLAINTIFFS' PRODUCTION REQUEST FOR QUALIFIED IMMUNITY

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Plaintiffs' Mark B. Rasmusson, et al., by and through their attorney of record, Sandra J. Sheppard of the firm of Sheppard & Associates and files Plaintiffs' Production Request for Qualified Immunity:

1. All case initiation and approval documents relating to RASMARK Jet Charter, Inc., Mark B. Rasmusson,- Deborah L. Rasmusson, and Andrew A. Gantkessy, (Plaintiffs) by the United States Customs Service (USCS), Internal Revenue Service (IRS), Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), -U. S. Border Patrol (USBP), Immigration and Naturalization Service (INS), Bureau of Alcohol, Tobacco, & Firearms (BATF), U. S. Secret Service (USSS), U. S. Marshals Service (USMS), El Paso County

Sheriff's Office (EPSO), and the El Paso Police Department (EPPD) for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, and 1995.

2. All Grand Jury requests and approval documents related-'to the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, and 1995.

3. All Undercover requests and approvals relating to the Plaintiffs, including but not limited to Operation Transwestern by the USCS, IRS, FBI DEA, USBP, INS, BATF, USSS, USMS, EPSO, and EPPD for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

4. All documents reflecting requests and approval, for confidential expenditures by the USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO, and EPPD used in the investigation of the Plaintiffs and Operation Transwestern and any transfer of funds from any ongoing undercover operation to the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, and 1995.

5. All documents shoving requests, approvals and payments to confidential informants (paid and not paid) by the USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO, and EPPD used during the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

6. The disclosure of the identity of confidential informants or sources, paid or not paid, by the USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO and EPPD during the investigation of the Plaintiffs who were either past or present employees of the Plaintiffs, including competitors of RASMARK, or active law enforcement officers for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, and 1995.

7. All documents reflecting requests and approvals for pen registers, telephone/wiretaps and other electronic monitoring by the

USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO, and EPPD during the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

8. All memorandums, reports, summaries, statements and affidavits prepared by the USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO, and EPPD during the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

9. All agents or officers diary entries or activity reports relating to the investigation of the Plaintiffs by the USCS, IRS, FBI, DEA, USBP, INS, BATF,USSS, USMS EPSO, EPPD for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

10. Listing of all TECS lookouts placed on the Plaintiffs, including persons, aircraft, and vehicles for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995 placed by the USCS, IRS, FBI, DEA, USBPI INS, BATF, USSS, USMS, EPSO and EPPD.

11. All requests for outside employment and related approval or disapproval by the EPPD for officer George Salas for the years 1991, 1992, 1993, 1994 and 1995.

12. Copies of all personnel evaluations for George Salas by the EPPD as they relate to the investigation of the Plaintiffs for the years 1991, 1992, 1993, 1994 and 1995.

13. EPPD personnel records which show the duties, responsibilities and all assigned details of officer George Salas for the years 1991, 1992, 1993, 1994 and 1995.

14. All requests and approvals for Title 26 disclosure by the USCS, FBI, DEA, USBP, INS, BATF, USSS, and USMS to the IRS related to the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

15. All case closing documents related to the Plaintiffs by the USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO and EPPD, including those reflecting the date closed for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

16. All prosecution reports submitted to the U. S. Attorney's Office by USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO and APTEST relating to the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992 and 1993, 1994 and 1995.

17. All records reflecting drug, currency and other property seizures made by the USCS, IRS, FBI, DEA, USBP, INS BATF, USSS, USMS, EPSO, and EPPD from the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

18. A financial summary of all agents salaries and overtime expended, and a financial summary of all other expenditures made by the USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO and EPPD, including but not limited to confidential expenditures, undercover expenditures, travel expenses, and informants payments made relating to the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

19. Complete copies of the USCS, IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO and EPPD agents and police officers handbooks relating to investigative disclosures, non investigative disclosures, initiation of undercover operations, transfers of funds between undercover operational utilization of other law enforcement personnel as informants or confidential sources, trash pickups, and the treatment of minors for the years 1991, 1992, 1993, 1994, 1995.

20. Results of all criminal (prosecution and non prosecution) and civil examinations by the IRS of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989,1990, 1991, 1992, 1993, 1994 and 1995.

21. Records of all referrals made by the IRS Criminal Investigation Division to the IRS Examination Division concerning the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

22. El Paso Sanitation Department guidelines and policies relating to the use of trash pickups by law enforcement agencies for the years 1990, 1991, 1992, 1993, 1994 and 1995.

23. The names of all Sanitation Department employees who participated in trash pickups on the Plaintiffs, including but not limited to 11157 Leo Collins and 6805 Boeing Drive both located in El Paso, Texas for the years 1990, 1991, 1992, 1993, 1994 and 1995.

24. All internal memorandum or records reflecting violations of agency guidelines, manuals, or procedures by USCS, IRS, DEA, USBP, INS, BATF, USSS, USMS, EPSO, and EPPD relating to the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

25. A copy of all videotape recordings made by FBI SA Joe Acosta on November 22, 1993 before and after the execution of the search of the Rasmusson residence located at 11157 Leo Collins Dr. in El Paso, Texas.

26. A copy of all documents and/or reports of investigation of the interview of Rasmark pilot on June 1, 1993 by SA Frost, SA Schroeder and Officer Holland. (This pilot was probable Mr. William E, Jiles who resides at 2828 Locharen Dr,, Plano, TX 76023.)

27. A copy of the administrative subpoena served upon the Ford Motor company World Headquarters by the FBI Detroit Field office in late October, 1992. See Acosta Declaration page 3 par. 14.

28. A copy of all the documents received by FBI pursuant to the Administrative subpoena identified in #3 above.

29. A copy of all subpoenas referred to in the Declaration of SA Frost page 2 paragraph 11.

30. A copy of all documents obtained by Customs Service Auditor, Hector Barrera or SA Frost pursuant to the subpoenas referred to in paragraph 5 above.

31. A copy of all letters memorandums or other correspondence or documents prepared by SA Frost for the signature of SAC Lappe relating to the investigation of the Plaintiffs for the years 1991, 1992, 1993, 1994 and 1995.

32. A copy of all documents and items alleged in the Frost Affidavit to have been seized from residential trash including but not limited to the following:

a. Airport landing receipt retrieved by from trash on March 18, 1993.

b. Computer generated balance sheet reflecting four flight invoices retrieved on March 22, 1993.

c. BANAMEX deposit slip in the amount of 15,216,055.00 dated July 23, 1992 and retrieved on April 5, 1993.

The following are alleged to have been retrieved on April 8, 1993:

d. Two pages from a personal phone book.

e. Internal telephone or intercom listing for phones and fax machines

f. A yellow sheet of 8.5 x 11 paper with notation King Air Albq with the names Juan & Tim.

g. Two American Express receipts one dated March 1, 1993.

The following are alleged to have been seized from the residential trash on April 19, 1993:

h. Blank Note pad from Rasmark Jet Charter.

1. Sheet of paper from a MZM delivery service.

j. A letter from the Sonitrol alarm company.

k. A letter and price list from Phillips 66 Company.

1. A mexican permit for Anna Rasmusson to travel by aircraft into Mexico dated December 30, 1992.

m. Pilot duty logs dated in 1992 and 1993 and found on May 6, 1993.

n. Folded up advertisement form from the Internal Revenue giving instructions for cash purchases over $10,000.

0. Announcement for neighborhood watch program retrieved on June 7, 1993.

p- Letter from Deborah Rasmusson to all company employees retrieved on June 11, 1993.

q. Questionnaire from Ford Motor company, envelope from Golf Digest and a bill for$73.17 retrieved on June 17, 1993.

r. Envelope with the name Bill Jilles and phone number retrieved on June 28, 1993.

The following are alleged to have been seized from residential trash on July 26, 1993.,

s. A letter from Fields and Healy, Attorneys at Law.

t. A telephone listing.

u. A listing of seven credit cards.

v. A page from a date book.

w. A check stub dated 4-05-93.

x. A FAX dated 5-26-93.

y. A FAX dated 5-27-93 about aircraft insurance.

The following are alleged to have been seized from residential trash on August 16, 1993:

z. Statement of interest income from Avon National Bank.

aa. Pages from a personal telephone book.

ab. A telephone list for Rasmark Jet Charter employees.

ac. Notice of insufficient funds from Sun World Savings retrieved on August 23, 1993.

ad. 8.5 x 11 yellow paper with dates, names of files, and number of disk found on September 20, 1993.

The following are alleged to have been seized from residential trash on October 26, 1993:

ae. Six blank checks in the name of Debra Rasmusson.

af. Check stub number 0581.

ag. Bill from Safeguard Business Systems dated July 26, 1993.

ah. Commission note dated 3/17 with initials DMJ alleged to have been seized on November 1, 1993.

ai. Commission note dated in the amount of $726.96 with initials DNU alleged to have been seized on November 1, 1993.

The following are alleged to have been seized from residential trash on November 4, 1993:

aj. Memo paper with Cargo pirates on top.

ak. A form from San Carlos country Club.

al. A torn up envelope.

am. An envelope from Ginnings Birkelbach & Keith attorneys.

34. Report dated June 7, 1993 by SA Joe Acosta regarding an interview of a confidential informant.

35. Report from SA Acosta given to SA Frost on November 3, 1993, regarding statements made by confidential Informant FBI-1.

36. Report of SA Mills dated September 16, 1992 regarding a red Mercedes 560SL at the Rasmark Jet Charter office parking lot.

37. Copy of all reports pertaining to the incident of SA Frost's seizure of Deborah Rasmusson's Red Mercedes at the Ysleta Port of Entry on November 10, 1992.

38. Copy of the report of interview of Arturo Vargas on February 12, 1993 by SA Schroeder and Detective Holland.

39. A copy of the report of Detective James Holland regarding his interview of Officer Clifford Gongaware on March 1, 1993.

40. A copy of the report of Detective Holland regarding information provided by Officer Andrew DeAngelo on March 1, 1993.

41. A copy of the report of interview of Gail Beech by SA Frost and Eric Mills on March 9, 1993.

42. A copy of the report or notes by SA Frost on March-15, 1993, of his interview of Steve Thorn.

43. A copy of the report of investigation by SA Schroeder and/or Detective Holland regarding their interview of Chris Hines on March 16, 1993.

44. A copy of the report of surveillance on the Rasmark Jet Charter offices on May 3, 1993 by Detective Jerry Keith.

45. A copy of the report of interview of Joe Seaverns by SA Schroeder and SA Joe Acosta on May 11, 1993.

46. A copy of the affidavit of Jerry Burnett dated May 21, 1993.

47. A copy of the Banamex computer printout obtained by SA Frost on May 24, 1993.

48. A copy of the report of interview of Mr. Gantkessy on June 2, 1993 and June 3, 1993 by agents SA Schroeder, SA Frost, James Holland, Joe Acosta and other agents.

49. A copy of the report of interview of Irasema Sanchez on November 4, 1993 by Detective Holland.

50. A copy of all notes, reports, summaries, of information provided by George Salas to SA Frost or other task force agents or officers during the period January, 1992 through January, 1995.

51. A copy of all reports of interview of Lori Nelson and letters or other correspondence regarding Mark Rasmusson, Jr. in early June, 1992.

52. A copy of all reports of interview of attorney William Cole on June 17, 1992 or letters or other correspondences.

53. A copy of all reports or analysis of the records seized by SA Frost on May 24, 1992, from Deborah Rasmusson at the Diamond Shamrock store prepared by any and all members of the Financial Task Force led by SA Frost.

54. A copy of each of the 98 reports prepared by SA Schroeder during the period he was a team leader for the Rasmusson portion of the larger money laundering investigation.

55. A copy of all surveillance reports prepared by SA King as to his surveillance of Plaintiffs between September 8, 1993 and September 15, 1993.

56. A copy of all photographs and/or videotape made by SA King during the search of the Rasmark office on November 22, 1993.

57. A copy of all Operation Transwestem. monthly reports relating to the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

58. A copy of all Operation Red Chili Monthly Reports relating to the investigation of the Plaintiffs for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 19§4 and 1995.

59. A copy of all internal audits and Management Inspection division Audit reports on Operation Transwestern and on Operation Red Chili.

60. A copy of Operation Transwestern Case Chronology and Review Form relating to the investigation of the Plaintiffs -for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

61. A copy of the Operation Red Chili Case Chronology and Review Form for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, and 1995.

62. A copy of the Operation Portillo or what ever code name was assigned to the Plaintiffs' case or cases Case Chronology and Review Form for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

63. A copy of the salvage or repair paperwork for the camera lens that SA King alleges malfunctioned during the execution of the search warrant of November 22, 1993.

64. A copy of all reports of investigation as to interviews of former Rasmark employees, acquaintances, and business associates of

Mark B. Rasmusson, Deborah L. Rasmusson, and Andrew A. Gantkessy for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

65. A copy of all surveillance records of the Rasmusson residences, including in locations other than El Paso, Texas, for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

66. A copy of all the surveillance records of the Rasmark office, in El Paso, Texas and previous location in Nevada for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

67. A copy of all reports used to brief SAC Lappe as to the progress of the investigation of Rasmark and the Rasmussons for the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

68. A copy of the transcripts of SA Perkins grand jury testimony on September 19, 1990 and a copy of all documents that SA Perkins presented to the grand jury as evidence to support indictment of Mark B. Rasmusson.

69. A copy of an unredacted version of DEA-6 ROI dated September 17, 1990, in case M7-90-ZO02 pertaining to the interview of Mark and Deborah Rasmusson and other Rasmark employees.

70. A copy of SA Hivick report of her surveillance of the Rasmark offices on August 20, 1992.

71. A copy of all reports of investigation pertaining to the search and seizure of Rasmark aircraft on or about May, 1993, June 1, 1993, June 16, 1993 and September 1, 1993.

72. A copy of all TECS pertaining to aircraft owned by Rasmark during the years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995.

73. A copy of the report of investigation regarding the interview of Mark B. Rasmusson on December 8, 1992, by SA Hivick and SA Searls.

74. A copy of the report of SA Hivick as to the search of the Rasmark offices on November 22, 1993.

75. A copy of all notes, reports, prepared by Neil Baker regarding his retrieval of trash, surveillance and other -minor investigative duties.

76. A copy of all notes, reports, prepared by Jerry Keith regarding his retrieval of trash, surveillance and other minor investigative duties.

77. A copy of all records pertaining to sharing of seized assets between USCS and IRS, FBI, DEA, USBP, INS, BATF, USSS, USMS, EPSO and EPPD.

78. A copy of all records and information that SAC George McNenney (the person who took Michael Lappe's SAC position when Lappe was transferred to The Hague or to some other location, that is, the present SAC in charge of the Customs Office of Enforcement in El Paso, Texas) submitted to the Department of Justice in a last ditch effort to get Mark Rasmusson indicted.

79. A copy of the Headquarters Proposal and Authori zation for operation Transwestern.

80. A copy of the Headquarters Proposal and Authorization for Operation Red Chili.

81. A copy of the Headquarters Proposal and Authorization for Operation Portillo or what ever code name is used for the investigation of the Plaintiffs.

82. A copy of the AUO time sheett for former ASAC Donald Reay for the dates May 23, 24, and 25 of 1992.

83. A copy of all funding approval for the off-site from the Multi-County Task Force location at 8037 Lockheed to the location at 9400 Viscount financial task force that investigated Rasmark and the Rasmussons.

84. A copy of all complaints filed by retired Group Supervisor Ward Olson against SAC Lappe and the documents created during the course of the investigation of these complaints pertaining to the unlawful taking of funds from Olson's undercover operation.

85. A copy of all records that show the approval by John E. Hensley for the allocation of funds to conduct a special operation against the Plaintiffs.

86. A copy of the Report of Investigation of the Treasury OIG investigation of Michael Lappe case number I-SO-92-003 including 57 exhibits.

87. All records of the El Paso Animal Control Division showing the recovery of either a black wild cat, rabid or otherwise from the residence of Deborah L. Rasmusson at 11157 Leo Collins, El Paso, Texas 1990 to 1994.

88. All records of the EPPD Bomb Squad pertaining to the object that appeared to be a bomb, but determined to be a fake bomb, at the residence of Deborah Rasmusson located at 11157 Leo Collins Drive, El Paso, Texas, as reported by EPPD officer George Salas between January 1992 and May 23, 1992.

89. All records from State National Bank, Texas Commerce Bank, El Paso State Bank, Avon National, Merill Lynch, Wells Fargo, or any other financial institution used by the Mark B. Rasmusson, Deborah Rasmusson or Rasmark Jet Charter, Inc., for any notes, papers, documents relating to contacts with any bank employee by any law enforcement officer regarding any loan request, checking account, or other financial transaction by Rasmark, Mark o r Deborah Rasmusson.

90. The document presented to Deborah L. Rasmusson by

Lawrence E. Frost at the Customs Office on viscount authorizing surrender of Rasmark aircrafts and assets to the U. S. Government on May 23, 1992.

91. All investigative reports prepared by Phil Asiala and/or Tim Pomaville of Ford Motor Company pertaining to Andrew A. Gantkessy, Mark B. Rasmusson, Deborah L. Rasmusson and Rasmark Jet Charter, Inc., including but not limited to, investigation of Rasmark invoices for any type of irregularities, and reports that were sent to any law enforcement agency, whether federal or state for the years 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995 and 1996.

92. Copy of all investigative reports and/or correspondence received by Phil Asiala and/or Tim Pomaville or any other Ford employee, from any law enforcement agency, whether federal or state pertaining to Mark B. Rasmusson, Deborah L. Rasmusson, Andrew A. Gantkessy and/or Rasmark Jet Charter Inc for the years 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995 and 1996.

93. Records of all Forms 4789 Currency Transaction Report (CTR's),(enforced by IRS); Forms 4790 Currency Monetary Instrument Report (CMIRs) (enforced by USCS), and Forms 8300 Record of Currency Transaction for a trade or business (enforced by IRS) filed by Rasmark Jet Charter, Inc.

Respectively submitted,

SHEPPARD & ASSOCIATES

/s/ SANDRA JACKSON SHEPPARD
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FILED: March 18, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON, ET AL.,	§	
	§	
PLAINTIFFS,	§	CIVIL ACTION:
	§	EP-95-CA-475-F
	§	
vs.	§	
	§	
LAWRENCE E. FROST, ET AL.,	§	
	§	
DEFENDANTS	§	

MOTION FOR RECONSIDERATION OF THE COURTS ORDER DENYING PLAINTIFFS MOTION TO ADD U.S. CUSTOMS SERVICE AS PARTY-DEFENDANT IN PLAINTIFFS THIRD AMENDED COMPLAINT

TO THE JUDGE OF SAID COURT:

COMES NOW PLAINTIFFS, Mark B. Rasmusson, et al., by and through their undersigned attorney, Sandra Jackson Sheppard of the firm of Sheppard & Associates and pursuant the Court's telephonic instructions requiring Plaintiffs to file a motion for reconsideration of the Courts denial of plaintiffs motion to add the U. S. Customs Service as a party defendant as to Privacy Act violations only.

1. Plaintiffs requested leave to add the United States Customs Service as a party defendant in this lawsuit for violation of the Privacy Act 5 U.S.C. § 552a. Where employees or agents of any federal agency violate the provisions of the Privacy Act, the Act confers a private right of action and waives Sovereign immunity of the United States for

purpose of suit. The Privacy Act specifically requires the agency to be the proper party defendant in any suit brought for Privacy Act violations.

2. Plaintiffs incorporate herein Plaintiffs Reply To Federal Defendants Opposition To Adding United States Customs Service As Party, ("Plaintiffs Reply") filed on March 13, 1997, as if fully set in Plaintiffs Motion For Reconsideration Of The Courts Order Denying Plaintiffs Motion To Add U. S. Customs Service As A Party Defendant In Plaintiffs Third Amended Complaint.

3. Defendants oppose adding U.S. Customs Service as a party defendant on the ground that plaintiffs stating that "no evidence to date shows ... that any USCS employee has violated any of Plaintiffs rights protected by the Privacy Act." Defendants statement is not true. The most glaring violation of the Privacy Act by Defendants Frost, Reay, Wilczewski, and Lappe is the letter written to The Ford Motor Company on July 26, 1993. This letter is attached to Plaintiffs Second Amended Petition as Exhibit 3. This letter fails to comply with any of disclosure provisions of the Privacy Act. Defendants allege that any Privacy Act violation is time barred. However, the Defendants failed to establish a date that Plaintiffs knew or should have known of the existence of the letter that would start the limitations clock. The Lappe letter and other documents that show Privacy Act violations were obtained from Mr. Silvas file on Plaintiff Gantkessys claim of discrimination against him by The Ford Motor Company. The EEOC obtained the Lappe letter and other documents reflecting violation of Plaintiffs rights under the Privacy Act from the Ford Motor Company. See PLAINTIFFS REPLY.

4. At the time Lappe wrote and sent the July 26, 1993, letter to Ford, Lappe did not send a request for permission from Plaintiffs to disclose false and misleading information to Ford nor did Lappe send Plaintiffs Gantkessy and Mark and Deborah Rasmusson a copy of the letter.

5. The Privacy Act 552a (g)(1)(C) provides

"Whenever any agency fails to maintain any record

> concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual;" or section 552a(g) (4) provides "In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court."

Section 552a(g)(5) provides:

> "An action to enforce any liability under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to the establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two year after discovery by the individual of the misrepresentation."

6. In *Johnson Department of Treasury, Internal Revenue*

Service. 700 f.2d 971 (5th Cir.1983) discussed the Privacy Act in detail. The Johnson Court found that the standard for maintaining an action under the Privacy Act: "In a suit f or damages, the amendment reflects a belief that a finding of willful, arbitrary, or capricious action is too harsh a standard of proof for an individual to exercise the rights granted by this legislation. Thus the standard for recovery of damages was reduced to willful or intentional action by an agency. On a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence."

7. The Court requested that Plaintiffs show in excruciating detail that the U. S. Customs acted with malice. In *Duffy v. Leadina Edge Products, Inc.*, 44 F.3d 308 (5 th Cir.1995) the Fifth Circuit reviewed the definition of malice. The Court referred to the common law definition, "malice has been defined as ill will, bad or evil motive, or such gross indifference or reckless disregard of the rights of others as to amount to a willful or wanton act." Quoting *Marathon Oil Co.*, 682 S.W.2d at 631. Actual malice in the defamation of character sense was defined by the U. S. Supreme Court in *New York Times v. Sullivan*, 376 U. S. 254 (1964) which stated "actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true." Proof of ill will or animosity is not required to show actual malice, evidence of ulterior motive can often bolster an inference of actual malice. *Duffy v. Leading Edge Products. Inc., supra* at note 10. In addition, *In Brown v. Petrolite Corporation*, 965 F.2d 38 (5 th Cir.1992) the Fifth Circuit observed that "a court or jury may infer actual malice from objective circumstantial evidence which can override a defendants protestations of good faith. Quoting *Schiavone Construction Co. v. Time. Inc.*, 847 f.2d 1069, 1090 (3d Cir.1988).

8. From the words and actions of the Defendants a reasonable inference of actual malice can be derived.

FACTS SUPPORT ACTUAL MALICE

9. On or about July 10, 1992 SA FROST contacted Lori Nelson, the ex-wife of Mark B. Rasmusson and the mother of Mr. Rasmussons [sic] son Mark, Jr., under the pretext of obtaining information. FROST so alarmed her that Ms. Nelson had her attorney William Cole to contact FROST.

10. After his conversation with FROST, Attorney Cole filed a motion to modify visitation rights and filed his affidavit (see App. 1292) documenting the conversation with FROST. FROST made the following false disclosures to COLE:

(1) that the Rasmussons were still under investigation by federal authorities relating to the Jesus FLORES criminal organization;

(2) that the criminal charges had been dismissed against Mark B. Rasmusson because a witness failed to appear and testify;

(3) that within the previous 30 days Debra Rasmusson had come into his office high on controlled substances and had admitted that she was addicted to controlled substances and had been f or many years;

(4) that Debra Rasmusson told FROST that she was carrying a weapon because she thought her husband, Mark B. Rasmusson, and his friends, were trying to kill her because she was a security risk.

10a. Each referenced inflammatory disclosure made by FROST was uncorroborated by any type of independent corroborating evidence. FROST true pure [purpose] for contacting Lori Nelson was to retaliate against Mark and Deborah Rasmusson because FROST, on behalf of himself , USCS, and other members of the Financial Task Force, failed on May 23, 1992 to coerce Deborah Rasmusson into signing a consent to search form for the Rasmussons residence and their business, Rasmark Jet Charter, Inc. Our expert witness, Edward Wagner, in his affidavit, states that the "There is no indication that agent Frost ever

asked Mr. Cole for any information, or that he prepared a report relating to this contact. There is no investigative purpose to the disclosures. The disclosures made by agent Frost clearly exceed the Dept. Of Treasury standard and were clearly made with a vindictive and malicious purpose to punish the Rasmussons because Deborah Rasmusson refused to sign a consent to search form for the offices of RASMARK when she was detained and interviewed on May 23, 1992, " (see Affidavit of Edward H. Wagner, Pages 2-3). [See App.1406, ¶ 6].

10b. Additionally, our expert witness, Henry A. Webb, states in his affidavit that "There clearly was no investigative purpose in Agent Frost furnishing the information to either Ms. Nelson or Mr. Cole. There is no information either from DEA or any other agency to support Agent Frosts missing witness statement," (see Affidavit of Henry A. Webb, Pages 7-8). [See App.1457, ¶ 32-34]

10c. Further evidence that FROST, on behalf of himself, USCS, and other members of the Financial Task Force, acted with willfully, intentionally and maliciously is clear from the acts and conduct of the agents pertaining to Andrew A. Gantkessy. In his affidavit, Mr. Gantkessy states that,

> "In June 1993, I was working at my office in El Paso. I was informed that a US Customs officer was at the security door and wished to speak to me. He had not made a prior appointment and I assumed that one of our trucks might have had a problem crossing the bridge into the US from Mexico. When I went to the security door to meet the officer, I was confronted by five or six federal agents and one El Paso police officer. I was taken to a conference room in the building where all the agents started to interrogate me. I asked that my supervisor be allowed to come into the room but Larry Frost, who seemed to be in charge, denied my request.
>
> Frost started to question me in a very aggressive manner, sometimes shouting and using profanity.

Within a few minutes I became very upset and frightened. I asked permission to call my wife and to call an attorney. I was told that if I got out of the chair in which I was sitting, I would be arrested, handcuffed, and dragged out of the building in full view of the other employees. The agents continued to questioned me non-stop for several minutes about Mark and Debbie Rasmusson. They also accused me of accepting money and free transportation from the Rasmusson. They claimed that I had received up to $5,000.00 kickback for all flights booked with Rasmark Air Charter. This was not possible since most of the flights cost less than $5,000.00 total. For several minutes I denied all the accusations being made against me by the agents.

After a while I started to feel sick. I was under a Doctors care at the time being treated for a heart condition. I had triple by-pass heart surgery in 1987 and had a stroke in May 1990. I was afraid that I was about to have another heart attack. In order to get out of the room, I finally told the agents that I would agree to anything they said. Once I said that and stopped denying their accusations, I was allowed to leave the room. Any admissions I made during the last few minutes with the agents were made out of fear and intimidation and were not true. I was feeling sick and went directly home. Before the agents released me, I was ordered to report to the US Customs office on Viscount Blvd. The following day. I was told that if I failed to show up at the Customs office, I would be arrested.

The following day I went to the Customs office where I was met by Customs Agent Fred Schroeder and FBI Agent Joe Acosta ... I told him (Schroeder) that I was not aware of any illegal activities on the part of either Mark or Debbie or any employee of Rasmark Air Charter.

> Schroeder asked me if I would be willing to wear a "Wire" and record conversations with the Rasmusson. I told him that I would think about it and him an answer the next day. He also asked me to make a phone call from his office to Mark Rasmusson and allow him Schroeder, to record the call. He told me that he would tell me what to say. I refused to make the phone call. Before allowing me to leave the Customs office, Agent Schroeder again made threats against me, telling me that I would lose my job and to jail if I refused to cooperate with him and the other agents. He assured me that if I cooperated, nothing would happen to me," (see Affidavit of Andrew A. Gantkessy, Pages 1-3). [see also App. 3 Oct 96]

10d. On the following day GANTKESSY contacted his lawyer, Tony Silva, and told him what happened. Mr. Gantkessy wanted his advise about whether he should wire a wire. Mr. Silva instructed him to ref use to wear the wire and refuse to cooperate with any of the federal agents. Andrew GANTKESSEY states in his affidavit that "When I called Schroeder and told him that I would not wear the wire, he seemed very upset. He told me that I was making a big mistake and that he and the other agents would start "playing hardball", (see Affidavit of Andrew A. Gantkessy, Page 4) . [Aff 3 Oct 96]

10e. Subsequent to the interrogation of Andrew A. Gantkessy, three events occurred that further documents the fact that USCS acted willfully, intentionally, and maliciously. All the subsequent information was entered into the USCS official agencys system of records. These official USCS records documents that on or about July 26, 1993, FROST, on behalf of himself, USCS, and other members of the Financial Task Force, sent a poison pen letter to Ford Motor Company. In this letter USCS, signed by SAC LAPPE, the highest ranking agent in the El Paso Customs office, cites highly inflammatory and unsubstantiated allegations pertaining to Mr. Gantkessy and the Rasmussons. The letter refers to agents interrogation of GANTKESSY on June 2nd and 3rd of 1993, alleging GANTKESSY made admissions of kickbacks and payoffs. The letter referred to allegations of drug

smuggling and a conspiracy to defraud Ford by a scheme between GANTKESSY and the Rasmussons; allegations of false RASMARK invoices, and more. None of the inflammatory allegations were true. USCS knew, or should have known, from the Ford records already subpoenaed by the FBI documented no acts of criminal activity pertaining to either drug smuggling, money laundering, violations of the Bank Secrecy Act, mail fraud, kickback or payoff schemes or tax evasion. FROST in deposition of January 10, 1992 stated he had no analysis done of the Ford records. ACOSTA in his deposition of January 24, 1997 (see App.714) stated that he only briefly reviewed the Ford records and had no further analysis done on these records; he further stated that he gave a copy of these records FROST for the use the USCS and Financial Task Force.

10f. Further documentation of USCS willful, intentional and malicious acts and conduct is revealed in two meetings that occurred between Ford officials and the USCS. On August 18, 1993 and on September 24, 1993, FROST, SCHROEDER, and HOLLAND relayed highly inflammatory and false allegations to Ford officials, citing to Ford the alleged admissions of GANTKESSY made on June 2nd and 3rd of 1993, (see the Affidavits of Henry A. Webb and Edward H. Wagner for more details). [Wagner at App.1409, ¶ 11-23; Webb at App.1453, ¶ 16-18; ¶28-31; ¶37-52]

10g. Our expert witness, Edward Wagner, states that "The memorandum does not indicate that agent Schroeder or officer Holland ever sought to obtain any information or records from the Ford Motor Co. Officials, therefore the disclosures had no investigative purpose and are improper. Even if agent Schroeder and officer Holland had requested information the disclosures far exceed the Dept of Treasury standard and are both vindictive and malicious... Having reviewed the referenced disclosures and related documents, and based on my experience and training, the disclosures made to Ford Motor Company in the letter dated July 26, 1993... to the Ford officials during meetings on August 18, 1993 and September 24, 1993... and to William Cole ... far exceed the normal procedures and policies of Federal Law Enforcement agencies. In addition, many of the disclosures by agent Frost and the USCS had no investigative purpose and were made with

a vindictive and malicious purpose causing RASMARK to lose its contractual relationship with Ford Motor Company, and Andrew Gantkessy to lose his job and a major portion of his retirement with Ford Motor Co., (see Affidavit of Edward H. Wagner, Pages 5-6)[see App. 1404-1413].

10h. Our expert witness, Henry A. Webb, states in his affidavit, that based upon the other unprofessional actions of Agent Frost throughout the course of the Rasmark investigation, one can only assume that Agent Frosts motives in releasing the information were punitive and vindictive in nature. His frequent use of information which he knew or should have known was false and unreliable is a clear indication that he had no regard for the truth. The assumption that Agent Frost deliberately used false and misleading information in official investigative reports becomes a conclusion after one studies those facts and then compares them with other testimony.

10i. Agent Frosts testimony is directly contradicted on several occasions by that of FBI Agent Acosta. His, Agent Frosts testimony during his deposition is evasive at best. The reasons Agent Frost offered f or sending the "Poison pen" letter to Ford simply do not coincide with the facts supported by the testimony of Agent Acosta and the eventual facts developed the USCS Task Forces own investigation. It is noted that Agent Frost testified that he drafted the Ford letter which was signed by SAC Lappe. The letter was also read and approved by Michael Wilczewski, Agent Frosts USCS Supervisor and USCS Donnie Reay.

10j. I strongly believe that if the FBI reports of Agent Acosta and other supporting documentation not yet made available to Mr. Rasmussons attorney, are released by the court, the activities of Agent Frost will further indicate that he has lied under oath on several occasions...

10k. The Rasmark business which was thriving, expanding, and was on the threshold of landing a major national contract with Ford was virtually "shut down." Once all the company records were seized through the USCS Task Force search warrant, it was practically

impossible to operate ... The fact that the aircraft maintenance records required by FAA were held by Agent Frost for 14 months without any justification, further indicates to me Agent Frost was simply being vindictive. This was simply one more punitive, unjustified action on the part of Agent Frost. The fact that his supervisors at USCS, SAC Michael Lappe, ASAC Donnie Reay, and Group Supervisor Michael Wilczewski did not properly supervise his activities and did nothing to halt his outrageous conduct is an indictment of all those individuals in USCS who were responsible for his actions. The fact that USCS legal counsel for USCS would authorize the release of a letter such as that sent to Ford by SAC Lappe in July 1993 clearly indicates that all Agent Frosts unjustified, outrageous actions were supported by his supervisors and by the Agency itself...," (see Affidavit of Hank A. Webb, Pages 10-11)

10l. Moreover, evidence shows that between 1987 and 1990, Custom ports of entry throughout the United States and Canada were alerted to Rasmark aircraft which were searched, passengers strip searched, raid teams with guns holding Mark, Debra and Mark junior at gun point on several occasions. Evidence indicates that this treatment of Plaintiffs in the 1987-1990 period was brought about by Customs retaliation for Mark Rasmusson's exercise of his First Amendment right to organize professional pilots in El Paso and seek relief from Customs intolerable treatment during clearing Customs process at ports of entry. There is considerable evidence that Customs had a nationwide policy of taking retaliatory actions against anyone who complained about treatment by Customs including Customs employees and agents.

10m. Additionally, our expert witness, Mark Riden, a former Customs supervisor with considerable experience, states in his affidavit that "I know through my experience that you are not allowed to disclose case related information to non law enforcement persons or entities other than to secure information or records. The only provision I am aware of that allows an agent to disclose any information to a non law enforcement person or entity is an investigative disclosure to obtain information. The standard on investigative disclosures is to disclose only the minimum amount of information necessary to obtain the information required. In my twenty six and one-half years experience I

have never provided a non law enforcement entity or person a summary or synopsis of my case or one of my agents cases to obtain information or records," (see Affidavit of Mark Riden dated March 18, 1997). [See App.1471]

Therefore, based on the foregoing discussion, and expert witnesses opinions, of the USCS intimidation, harassment and retaliation, the inference is clear that all of the official USCS reports that were entered into the USCSs official system of records were a continuation of the willful, intentional and malicious acts and conduct of the USCS agents, in concert with other members of the Financial Task Force, that has been displayed repeatedly against all of the Plaintiffs.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court will enter an Order granting Plaintiffs' motion to add the U. S. Customs Service as a defendant in this lawsuit.

Respectfully submitted,

SHEPPARD & ASSOCIATES

/s/ SANDRA JACKSON SHEPPARD
State Bar No. 00786414
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El Paso, Texas 79925 (915) 772-4616
(915) 778-5678 FAX
Lead Counsel for Plaintiffs

Filed May 6, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON, ET AL.,	§	
	§	
	§	CIVIL ACTION:
	§	EP-95-CA-475-F
vs.	§	JURY DEMAND
	§	
LAWRENCE E. FROST, ET AL,	§	
	§	
DEFENDANTS	§	

MOTION FOR HEARING

COME NOW PLAINTIFFS, Mark B. Rasmusson, et al., by and through their attorney Sandra J. Sheppard, of the firm of Sheppard & Associates, pursuant to Federal Rules of Civil Procedure move the Court to set a date to have a hearing on issues specified below:

This case spans ten years of actions by defendants against Plaintiffs. Plaintiffs raised several issues that were not fully addressed by the Court on April 21, 1997. Plaintiffs request of a hearing is for the purpose of addressing the following issues.

A. Resolve discovery issues such as the obstructive tactics of defendants in preventing testimony by Defendants on the alleged grounds of disclosure of grand jury material or proceedings, or disclosure of investigative technique or methods, matter alleged to be out side the scope of qualified immunity, and defendants claim ongoing investigation and other reasons defendants objected to Plaintiffs deposition questions.

B. Conduct a Franks hearing as to the lack of probable cause in the search warrant affidavits prepared by Defendant Frost.

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully request that this Motion be granted so that in the interest of justice so that Plaintiffs will have a fair opportunity to present their case fully.

Respectively submitted,

SHEPPARD & ASSOCIATES

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State Bar No. 00786414

Filed June 6, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON, ET AL,	§	
	§	
PLAINTIFFS	§	
	§	
	§	CIVIL ACTION:
	§	EP-95-CA-475-F
VS.	§	JURY DEMAND
	§	
LAWRENCE E. FROST, ET AL,	§	
	§	
DEFENDANTS	§	

PLAINTIFFS' REQUEST FOR AN ORAL HEARING

COME NOW PLAINTIFFS, Mark B. Rasmusson, et al., by and through their undersigned attorney of record and file Plaintiffs' Request For An Oral Hearing. In support, Plaintiffs show the Court the following:

1. Plaintiffs filed three motions for reconsideration and/or clarification of the Court's order of May 27, 1997 regarding (a) Plaintiffs' Opposition To Federal Defendants' Notice of Substitution and Application for Order Thereon; (b) Plaintiffs' Motion to Compel Production of all Records That are Defendants' Basis of Good Faith Before the Court and Basis For Objections to Deposition Questions Or Alternatively Produce for In Camera Review; (c) Plaintiffs Motion to Transfer Connected Case From Judge Furgeson's Docket To Chief Judge Hudspeth's Docket and other motions and briefs that raise substantial disputed issues of fact and issues of law regarding qualified immunity.

2. Plaintiffs requested the Court to hold oral hearings on the

issues raised in Plaintiffs' motions specified in item 1 above. However, Plaintiffs' motions were denied without the Court reaching the merits of any of Plaintiffs' motions and briefs.

WHEREFORE, Plaintiffs request the Court to hold an oral hearing on Plaintiffs' motions for reconsideration.

Respectively submitted,

SHEPPARD & ASSOCIATES

/s/ SANDRA JACKSON SHEPPARD
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State Bar No. 00786414

FILED May 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
EL PASO DIVISION

MARK B. RASMUSSON, ET AL,	§	
	§	
PLAINTIFFS	§	
	§	
	§	CIVIL ACTION:
	§	EP-95-CA-475-F
	§	
VS.	§	JURY DEMAND
	§	
LAWRENCE E. FROST, ET AL,	§	
	§	
DEFENDANTS	§	

MOTION FOR LEAVE TO FILE PLAINTIFFS' MOTION TO STAY PROCEEDINGS UNTIL SUCH TIME AS CHIEF JUDGE HUDSPETH HAS REVIEWED PLAINTIFFS' MOTION TO (1) STRIKE EVIDENCE (2) TRANSFER THE MATTER AS A CONNECTED CASE TO CHIEF JUDGE HUDSPETH'S DOCKET, OR IN THE ALTERNATIVE (3) TO ALLOW PLAINTIFFS TO AMEND THEIR WITNESS LIST AND OFFER ADDITIONAL EVIDENCE ON THE ISSUE OF QUALIFIED IMMUNITY

COME NOW PLAINTIFFS, Mark B. Rasmusson, et al., by and through their undersigned attorney of record and file their Motion For Leave To File Plaintiffs' Motion To Stay Proceedings Until Such Time As Chief Judge Hudspeth Has Reviewed Plaintiffs' Motion To (1) Strike Evidence (2) Transfer The Matter As A Connected Case To Chief Judge Hudspeth's Docket, Or In The Alternative (3) To Allow Plaintiffs To

Amend Their Witness List And Offer Additional Evidence On The Issue Of Qualified Immunity. In support, Plaintiffs show the court as follows:

1. "Defendants' Reply To Plaintiffs' Opposition To Motion Dismiss Or, In The Alternative, Motion For Summary Judgment And Defendants' Objections To the Appendices Filed in Support Of Plaintiffs' Reply" was filed on May 6, 1997 ("Defendants' Reply"). Defendants rely heavily upon facts from the investigation and trial of Jesus Flores.

2. Defendants' Reply, in essence, is requesting this Court to enter an Order that would effectively operate to reverse the findings of Chief Judge Hudspeth and his judgment of acquittal rendered in favor of Mark Rasmusson. In Plaintiffs' motion to transfer connected case, Plaintiffs are requesting this matter be transferred to Chief Judge Hudspeth because of his unique knowledge of his personal subjective thoughts behind the rulings which effectively invalidated or discredited the evidence adduced in the Flores trial which evidence is now being reasserted by Defendants. In Fact, Chief Judge Hudspeth is the only jurist who can adequately review the government's use of facts and his rationale when he considered those same facts to be insufficient to establish any criminal activity whatsoever, much less a criminal connection between Jesus Flores and Mark Rasmusson.

Therefore, in the interest of justice and fairness, Plaintiffs' motion for leave should be granted.

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully request the Court to grant Plaintiffs' Motion For Leave To File Plaintiffs' Motion To Stay Proceedings Until Such Time As Chief Judge Hudspeth Has Reviewed Plaintiffs' Motion To (1) Strike Evidence (2) Transfer The Matter As a Connected Case To Chief Judge Hudspeth's Docket, Or In The Alternative (3) To Allow Plaintiff's To

Amend their Witness List And Offer Additional Evidence On The Issue Of Qualified Immunity.

Respectively submitted,

SHEPPARD & ASSOCIATES

/s/ SANDRA JACKSON SHEPPARD

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State Bar No. 00786414
Attorney for Plaintiffs

FILED: MAY 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON, ET AL,	§	
	§	
PLAINTIFFS	§	
	§	
	§	
	§	CIVIL ACTION:
	§	EP-95-CA-475-F
VS.	§	JURY DEMAND
	§	
LAWRENCE E. FROST, ET AL,	§	
	§	
DEFENDANTS	§	

PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF ALL RECORDS THAT ARE DEFENDANTS' BASIS OF GOOD FAITH BEFORE THE COURT AND BASIS FOR OBJECTIONS TO DEPOSITION QUESTIONS OR ALTERNATIVE PRODUCE FOR IN CAMERA REVIEW

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, MARK B. RASMUSSON, DEBORAH L. RASMUSSON, ANDREW A. GANTKESSY, and RASMARK JET CHARTER, INC., Plaintiffs in the above styled and numbered cause, by and through their undersigned attorney of record, pursuant to Rules 34 and 37 of the Federal Rules of Civil Procedure submit their motion for production and discovery.

A. Plaintiffs request the Court to compel Defendants to produce all records that are the basis of Defendants' good faith before the Court;

B. Plaintiffs request the Court to compel Defendants to produce all records on which defendants rely to support their claim of privilege for each objection defendants asserted during deposition of each Defendant;

C. Plaintiffs request in the alternative that Defendants be compelled to produce all documents in categories items A and B above for inspection and review of the Court in camera. In support Plaintiffs show the Court as follows:

1. On March 19, 1997, the Court scheduled a hearing the purpose of which was not stated in the Courts' notice. However, at that hearing, the Court discussed the format of the hearing that was scheduled for April 21, 1997. The Court and all counsel agreed that the April 21 hearing format would be for each Defendant to present his/her case devoting an hour if necessary where the entire day was set aside for the hearing. Defendants would use the same procedure as used in conducting oral argument in a court of appeal.

2. However, on April 17, 1997, the Court sent a letter to each attorney of record changing the format of the April 21 hearing. The format was changed to a "question and answer session between the Court and Plaintiff attorney Ms. Sheppard ..." Although sent by FAX on April 17, 1997, the Court's notice changing the hearing format to questions and answers was not received by Plaintiffs' counsel until the next day, April 18, 1997 due to a phone line failure. This format turned out to be like a trial on each issue where the Court required Plaintiffs to produce proof that would ordinarily be reserved for trial. Plaintiffs were not prepared to undertake proving their case in the April 21 hearing nor should Plaintiffs been required to do so.

3. During the course of the hearing, the Court took the position of raising issues such as "good faith" on behalf of the Defendants' counsel. Plaintiffs attempted to demonstrate that the Defendants have not acted in good faith in carrying out their ten year investigation where no credible evidence of drug smuggling, money laundering, kickback scheme, mail fraud, bank secrecy act, and tax evasion. At the very least this Court should order defendants to produce any evidence they have

that would support their claim that Plaintiffs engaged in the offenses listed by Defendant Frost in his November 19, 1993, affidavits.

4. As another example of bad faith, Plaintiffs attempted show that Defendant Reay lied in his deposition regarding Defendant Reay's statement that the Rasmark investigation is part of Operation Transwestern. Defendant Reay's lies would go to the issue of unreasonable conduct and bad faith.

5. The Court raised the argument that there could be two Operation Transwesterns. One in Albuquerque and one in El Paso. And the Rasmark investigation could have been a part of the one in El Paso. Plaintiffs deposition questions to Defendant Reay on Operation Transwestern were met with objection of privilege based on going investigation. Plaintiffs know at the time Defendant of Reay's deposition testimony that customs had only one Operation Transwestern that was run out of the Albuquerque RAC office. Operation Transwestern was concluded when the targets were tried and convicted in 1990-1991. Plaintiffs have a considerable number documents pertaining to Operation Transwestern which were released from Customs files pursuant to an FOIA request in 1994-1995. When asked for the name of the Customs Group supervisor of Operation Transwestern, Defendant Reay became evasive and would not reveal Group Supervisor Ward Olson's name despite the fact that Defendant Reay knew from Plaintiff's prior Amended Complaints that Plaintiffs knew the name.

6. This tactic by Defendant Reay and his attorney could only be considered bad faith and obstructive.

7. All the information pertaining to good faith is in the hands of the Defendants.

8. This motion is designed to bring to the Court all documents relevant to the issue of Defendants good faith before the Court. Secondly absent production for Plaintiffs review, Plaintiffs request that the documents be produced for in camera review by this Court on the issue of good faith. In addition, Plaintiffs request that Defendants be

compelled to produce all records on which Defendants rely to support their claims of privilege or other objection to deposition questions. In the event that an appeal is taken the issues of bad faith and lack of basis to object to deposition questions can be reviewed on a full record. In particular, Defendants raise their claims of privilege based on the following specified categories of objections.

9. The Defendants claimed privilege and raised objections which are grouped into the following categories:

a. "ongoing investigation"

b. "investigative technique",

c. "Grand Jury" material or matters appearing before the grand jury

d. "Irrelevant To Qualified Immunity",

e. "Qverbroad" Question

f. "Confidentiality"

g. "Ongoing Investigation"

h. "Confidential Informant Information"

10. After the deposition of Defendant Frost, the level and scope of objections increased to the point where the deponents' attorney was engaging in testimony for his client. Plaintiffs objected to the defendant's attorney engaging in such testimony.

11. The objections entered by each deponents' attorney are listed as follows:

DEPOSITION OF LAWRENCE E. FROST

SECTION I

The following pages from Defendant Frost's deposition, as referenced by page and line number:

(1)Page 17, L8-25 (report pertaining abuse of authority by Frost);

(2)Page 21, L24 - Page 22, L8 (reports pertaining to EPIC search);

(3) Page 24, L13-23 (reporting pertaining to information from search EPIC, and other data bases, indicating Mark B. Rasmusson was engaged in or engaging in between June 1991 and March of 1992 drug smuggling or money laundering;

(4) Page 25, L17 - Page 26, L2 (USCS SA John Peterson case files pertaining to investigation of the Rasmussons and Rasmark between June 1991 and March 1992;

(5) Page 29, L14-19 (report and analysis pertaining to review of court records, property liens, tax liens, etc.);

(6) Page 33, L22-25 (grand jury subpoenas);

(7) Page 35, L25 - Page 36, L7 (information in case files pertaining to money laundering after criminal trial of Mark Rasmusson);

(8) Page 36, L17 - Page 37, L8 (OCDETF committee meeting to certify Rasmark);

(9) Page 45, L16 - Page 46, L25 (report on association between Saenz and Portillo and how connected to the Rasmussons and Rasmark Jet Charter, Inc.);

(10) Page 51, L16-21 (uncover operation pertaining to the Plaintiffs);

(11) Page 53, L1-9 (trash reports pertaining to Dale Douglas address);

(12) Page 53, L23 - Page 54, L6 (documentation on request to sanitation department and approval for trash pick ups);

(13) Page 56, L16 - Page 57, L3 (objection);

(14) Page 67, L15-18 (detailed written report pertaining to interrogation of Deborah Rasmusson);

(15) Page 68, L13-15 (copy of consent to search document presented to Deborah Rasmusson on May 23, 1992 at Customs offices);

(16) Page 73, L2-15 (report pertaining to submitting charges to U.S. Attorney's office and being declined);

(17) Page 74, L3-17 (report pertaining to document analysis of contents from box known as "2 of 18" unlawfully seized from Deborah Rasmusson on May 23, 1992);

(18) Page 75, L22 - Page 76, L9 (report pertaining to seizure of N7GP from a hangar in Houston to determine if any connection with Rasmark at that time);

(19) Page 78, L15-16 (report pertaining to statement from Portillo claiming he gave the airplane, N7GP, to the Rasmussons and Rasmark);

(20) Page 79, L3-22 (report from DEA and Customs pertaining to allegations that Mark Rasmusson was engaged in trafficking, associated with other narcotics organizations);

(21) Page 79, L23 - Page 80, L16 (reports of investigation of John Peterson who had developed the original cause and information and provided background information on the case against the Rasmussons and Rasmark and reports on corroboration of specific incidents--ongoing investigation);

(22) Page 81, L4 - Page 82, L23 (report pertaining to U.S. Attorney's office declining alleged wiretap charges against Mark

Rasmusson);

(23) Page 82, L24 - Page 83, L9 (reports pertaining to any wiretaps placed on any of the Plaintiffs' telephone currently and in past);

(24) Page 83, L10 - Page 84, L19 (Customs Service guidelines or policies and procedures pertaining to "investigative disclosures" to third parties other than law enforcement agencies);

(25) Page 86, L6 - Page 90, L18 (report from Customs' general counsel David Lindsey approving July 26, 1993 letter sent to Ford Motor Company and report on pending charges from ongoing investigation);

(26) Page 93, L23 - Page 94, L1 (report pertaining to Frost's contact with Lori Nelson, ex-wife of Mark Rasmusson, and with William Cole, Lori Nelson's attorney);

(27) Page 94, L19 - Page 95, L4 (copy of subpoena for Frost to appear at custody hearing by Lori Nelson);

(28) Page 97, L5 - Page 98, L19 (report showing basis of Gail Beach information that Mark Rasmusson permitted George Arnold to use his (Rasmark) Cessna 210 to smuggle and transport marijuana and report pertaining to source of Gail Beach's information about Arturo Tarby and Guillermo Portillo business relationship with Rasmark);

(29) Page 98, L21 - Page 102, L6 (reports pertaining to all "lookouts" placed on aircraft and vehicles of the Rasmussons and Rasmark by either John Peterson, Frost, or any other agent or agency);

(30) Page 103, L1 - Page 104, L10 (reports on all searches done of Rasmark aircraft performed by Custom agents other than members of the Financial Task Force);

(31) Page 105, L2-13 (report pertaining to decertification of Rasmark investigation as OCDETF case);

(34) Page 106, L3-21 (report on Frost's presentation to OCDETF Committee to get Rasmark investigation certified as OCDETF case);

(35) Page 107, L3-16 (report on Special Agent in Charge decertifying Rasmark investigation to U.S. Attorney's office);

(36) Page 111, L3 - Page 112, L116 (document analysis report of records from execution of search warrants on November 22, 1993);

(37) Page 112, L17 - Page 113, L13 (basis of Frost's appearance at Port of Entry on November 10, 1992 when Deborah Rasmusson was arrested for switchblade knife and car allegedly seized for .1 gram of marijuana;

(38) Page 116, L25 - Page 117, L14 (reports pertaining to when suspicion of Gantkessy's alleged criminal activity first developed);

(39) Page 117, L21 - Page 118, L14 (reports pertaining to other contact with Ford Motor Company's representatives prior to interrogation with Plaintiff Gantkessy);

(40) Page 119, L15 - Page 120, L22 (ongoing investigation);

(41)Page 121, L17 - Page 122, L4 (reports pertaining to analysis documents retrieved from trash pick ups);

(42) Page 125, L17 - Page 126, L4 (documentation of under reporting of income);

(43) Page 126, L23 - Page 127, L1 (report on document analysis of box seized on May 23, 1992 from Deborah Rasmusson);

(44) Page 128, L8-16 (documentation of "legal formality" that covers Sanitation Department);

(45) Page 131, L9-14 (pertaining to whether Deborah Rasmusson agreed to become confidential informant);

(46) Page 134, L3-10 (reports pertaining to taking heroin, cocaine and marijuana);

DEPOSITION OF THOMAS LENOX

SECTION II

The following pages from Defendant Lenox's deposition, as referenced by page and line number:

(1) Page 12, L20 - Page 14, L16 (reports pertaining information learned from various law enforcement data bases indicating criminal activity on part of any of Plaintiffs pertaining to drug smuggling, money laundering, violations of Bank Secrecy Act, mail fraud, kickback schemes, or tax evasion);

(2) Page 16, L3 - Page 17, L1 (reports pertaining to any allegations of money laundering of $500,000 in proceeds from Jesus Flores, transporting currency);

(3) Page 17, L8-13 (reports pertaining to money laundering through purchasing aircraft parts);

(4)Page 17, L25 - Page 18, L6 (reports pertaining to "lookouts" placed on aircraft and vehicles of Rasmussons and Rasmark by DEA OCDETF Task Force);

(5) Page 19, L2-16 (reports showing basis of making Mark B. Rasmusson target of DEA OCDETF Task Force);

(6) Page 19, L17-24 (reports of any witnesses who failed to testify at criminal trial against Mark Rasmusson);

(7) Page 20, L11 - Page 24, L1 (reports pertaining to any document analysis of financial records subpoenaed by DEA from Albert Apodoca, Rasmark accountant in 1990);

(8) Page 24, L8 - Page 25, L12 (reports pertaining to any

ongoing investigation of Mark B. Rasmusson, Deborah Rasmusson or Rasmark);

(9) Page 25, L16 - Page 26, L1 (reports pertaining to any evidence Mark Rasmusson participating in money laundering activities between June 14, 1991 and March 1992);

(10) Page 28, L6-16 (reports on any connection between Jesus Flores and Mark B. Rasmusson in 1989);

(11) Page 29, L4-12 (reports showing IRS already had parallel investigation against the Rasmussons and Rasmark);

(12) Page 37, L2 - Page 39, L17 (reports pertaining independent corroboration of Rasmark transporting Colombian pilots or controlled substance for Jesus Flores);

DEPOSITION OF GEORGE L. SALAS

SECTION III

The following pages from Defendant Salas' deposition, as referenced by page and line number:

(1) Page 21, L3-9 (EPPD police report and disposition of tape);

(2) Page 31, L23 - Page 32, L9 (records pertaining to off-duty employment for Gregory Peck and others, not including the Rasmussons);

(3) Page 45, L6-14 (reporting pertaining to harassment complaint against Deborah Rasmusson);

DEPOSITION OF FONDA HIVICK

SECTION IV

The following pages from Defendant Hivick's deposition, as referenced by page and line number:

(1) Page 21, L16-24 (IRS case files pertaining to any previous or parallel investigations of the Rasmussons and Rasmark from 1987-present);

(2) Page 38, L7-18 (any document analysis of the Rasmussonsor Rasmark or Andrew Gantkessy, tax returns for period from 1987 through present);

(3) Page 49, L5-20 (AUSA Robinson directed Hivick not to answer question pertaining to connection between Guillermo Portillo and the investigation against the Rasmussons and Rasmark);

(4) Page 63, L10-24 (AUSA refusing to let witness answer question pertaining to connection between Portillo and Mark Rasmusson and whether Portillo was the alleged "larger money laundering investigation");

(5) Page 64, L1-21 (reports pertaining to investigation of other charters services as part of the larger money laundering "air transport initiative");

DEPOSITION OF FRED SCHROEDER

SECTION V

The following pages from Defendant Schroeder's deposition, as referenced by page and line number:

(1) Page 16, L12 - Page 17, L14 (using investigative technique as basis for not answering questions);

(2) Page 20, L24 - Page 21, L3 (all reports pertaining to interviews of Albert Apodoca and copies of any statements);

(3) Page 28, L24 - Page 29, L18 (using "ongoing investigation" as basis for not answering question pertaining to whether any property of the Rasmussons or Rasmark Jet Charter proceeds of drug smuggling or money laundering);

(4) Page 30, L9-22 (refusing to testify regarding USCS interviews with any informants that testified at Flores and Rasmusson's criminal trial);

(5) Page 35, L2-10 (using "investigative technique" to avoid question pertaining to surveillance of Rasmussons' home at 11157 Leo Collins Drive, El Paso, Tex.);

(6) Page 36, L11-25 (chain of custody of evidence, reports and location of evidence);

(7) Page 37, L3-16 (report to AUSA for prosecution based on items from trash);

(8) Page 38, L24 - Page 39, L4 (using "investigative technique" to avoid answering question);

(9) Page 44, L17-21 (objection to answering question pertaining to "Lookouts" placed on aircraft of Rasmark);

(10) Page 45, L14-24 (refusing to testify pertaining to any information put into TECS system pertaining to Rasmark aircraft);

(11)Page 45, L25 - Page 46, L14 (reports pertaining to interviews of Bobby Joe Leonard and Mark McAllister);

(12) Page 65, L18 - Page 66, L10 (produce all written letters of request to Sanitation Department);

(13) Page 81, L7-16 (report of interview with Bob Hunter

pertaining to alleged payoffs between Rasmussons and Gantkessy);

(14) Page 91, L11-23 (produce pieces of paper seized during execution of search warrants that corroborate kickback schemes between Gantkessy and the Rasmussons);

DEPOSITION OF JAMES HOLLAND

SECTION VI

The following pages from Defendant Holland's deposition, as referenced by page and line number:

(1) Page 12, L20 - Page 13, L20 (witness not permitted to testify about the alleged larger investigation which Rasmark was supposed to be a part of);

(2) Page 16, L13-19 (records pertaining salary paid by OCDETF or HIDTA funding);

(3) Page 59, L1 - Page 61, L3 (witness counsel refused to permit answer to question pertaining to surveillance activities of the Rasmark business);

(4) Page 64, L14-22 (after counsel conferred with witness outside of deposition, witness claims no knowledge to question);

(5) Page 65, L7-25 (produce reports pertaining to Customs aircraft used in investigation against the Plaintiffs);

(6) Page 67, L1 - Page 68, L4 (produce report showing when investigation ended against the Plaintiffs);

(7) Page 88, L17 - Page 89, L12 (witness counsel refused to let witness testify to connection between Guillermo Portillo and the investigation against the Plaintiffs);

DEPOSITION OF ERIC MILLS

SECTION VII

The following pages from Defendant Mills' deposition, as referenced by page and line number:

(1) Page 26, L12 - Page 27, L21 (witness not allowed to answer question pertaining to Guillermo Portillo and "investigative technique");

(2) Page 29, L17 - Page 30, L20 (witness not allowed to answer question pertaining to surveillance activities that he coordinated for the Task Force);

(3) Page 35, L5-12 (witness not allowed to answer question based on "Investigative technique");

DEPOSITION OF JOE L. ACOSTA

SECTION VIII

The following pages from Defendant Acosta's deposition, as referenced by page and line number:

(1) Page 17, L19 - Page 18, L7 (witness not allowed to testify on how case got started against the Plaintiffs);

(2) Page 18, L8-14 (witness not allowed to testify about alleged connection between Guillermo Portillo and the Plaintiffs);

(3) Page 20, L9 - Page 21, L1 (AUSA objects to Plaintiffs' use of the term "Rasmark case" while not allowing witnesses to testify to other individuals who were the main target of the investigation);

(4) Page 23, L4 - Page 26, L7 (witness not allowed to testify concerning decertification of the "Rasmark portion of the OCDETF");

(5) Page 29, L10-21 (AUSA coaching witness);

(6) Page 38, L14 - Page 39, L25 (witness testified he subpoena Plaintiffs' bank records);

(7) Page 45, L10 - Page 46, L23 (AUSA coaching witness and need documentation Grand Jury interview);

(8) Page 46, L24 - Page 47, L8 (grand jury objection);

(9) Page 55, L11 - Page 56, L16 (AUSA coaching witness);

(10)Page 62, L12 - Page 63, L3 (AUSA coaching witness and testifying for witness);

(11) Page 68, L10 - Page 72, L22 (coaching witness and obstructing deposition);

(12) Page 74, L5-21 (confidential information objection);

(13) Page 77, L9-22 (confidential information objection);

(14) Page 77, L24 - Page 78, L18 (grand jury objection);

(15) Page 78, L19 - Page 79, L4 (grand jury objection);

(16) Page 99, L11-14 (grand jury objection);

DEPOSITION OF DONALD REAY

SECTION IX

The following pages from Defendant Reay's deposition, as referenced by page and line number:

(1) Page 24, L4-14 (investigative technique);

(2) Page 26, L19 - Page 27, L4 (coaching witness);

(3) Page 43, L7 - Page 50, L23 (relevance and investigative technique);

(4) Page 76, L3-8 (coaching witness);

(5) Page 90, L2 - Page 91, L8 (pending investigation; irrelevant to qualified immunity);

(6) Page 91, L22-24 (investigative technique);

(7) Page 96, L22 - Page 97, L23 (investigative technique);

(8) Page 101, L21 - Page 102, L7 (investigative technique and irrelevant to issue of qualified immunity);

(9) Page 108, L17 - Page 112, L22 (irrelevant to issue of qualified immunity);

(10) Page 112, Page 23 - Page 113, L23 (obstructing deposition with frivolous questions);

(11) Page 115, L7-12 (irrelevant to issue of qualified immunity);

DEPOSITION OF MICHAEL WILCZEWSKI

SECTION X

The following pages from Defendant Wilczewski's deposition, as referenced by page and line number:

(1) Page 23, L24 - Page 24, L25 ("...I can't answer your question..."); page 25, L11-22 (evasive answer);

(2) Page 37, L16 - Page 38, L13 (investigative technique and irrelevant to issue of qualified immunity);

(3) Page 82, L22 - Page 84, L25 (potential investigative

techniques and irrelevant to issue of qualified immunity);

(4) Page 87, L23 - Page 89, 12 (evasive answer);

(5) Page 103, L5-10 (evasive answer);

(6) Page 108, L14-19 (evasive answer);

DEPOSITION OF NEIL AARON BAKER

SECTION XI

The following pages from Defendant Baker's deposition, as referenced by page and line number:

(1) Page 20, L5 - Page 21, L10 (grand jury privilege and investigative privilege);

(2) Page 21, L24 - Page 22, L9 (grand jury privilege and investigative privilege);

(3) Page 23, L20 - Page 24, L1 (investigative techniques);

(4) Page 27, L9-19 (grand jury privilege)

(5) Page 29, L7-19 (confidential informants);

(6) Page 30, L5 - Page 31, L4 (confidential informant);

(7) Page 32, L3 - Page 33, L1 (confidential informant);

(8) Page 50, L21 - Page 51, L2 (investigative privilege);

(9) Page 52, L4-14 (grand jury privilege or investigative privilege);

(10) Page 64, L9 - Page 66, L2 (investigative information and investigative technique);

(11) Page 66, L3-10 (ongoing investigation);

(12) Page 69, L9 - Page 72, L25) (outside scope of qualified immunity);

DEPOSITION OF GAIL BEACH

SECTION XII

The following pages from Defendant Beach's deposition, as referenced by page and line number:

(1) Page 21, L14 - Page 22, L10 (irrelevant to issue of qualified immunity);

(2) Page 22, L11 - Page 23, L3 (outside scope of discovery for purposes of these proceedings);

(3) Page 23, L4 - Page 24, L10 (beyond issue of qualified immunity);

(4) Page 29, L8 - Page 30, L2 (beyond scope of discovery as to qualified immunity);

(5) Page 31, L22 - Page 32, L11 (beyond scope of discovery as to qualified immunity);

(6)Page 32, L12 - Page 33, L7 (beyond scope of qualified immunity);

(7) Page 36, L19 - Page 39, L10 (out of the scope of relevant time period);

(8) Page 42, L13 - Page 43, L22 (irrelevant to issue of qualified immunity);

(9) Page 50, L8 - Page 51, L10 (beyond scope of discovery of qualified immunity)

(10) Page 51, L11 - Page 52, L6 (beyond scope of limited discovery);

(11) Page 52, L15 - Page 53, L14 (that question is wrong)

(12) Page 53, L15-22 (beyond scope of discovery);

(13) Page 53, L23 - Page 54, L4 (coaching witness);

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully request the Court to grant "Plaintiffs' Motion To Compel Production Of All Records That Are Defendants' Basis Of Good Faith before The Court And Basis For Objections To Deposition Questions Or alternative Produce For In Camera Review".

Respectively submitted,

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Received May 7, 1997
Filed May 16, 1997

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

MARK B. RASMUSSON, ET AL,	§	
	§	
VS.	§	CIVIL ACTION:
	§	EP-95-CA-475-F
LAWRENCE E. FROST, ET AL,	§	
	§	JURY DEMAND
DEFENDANTS	§	

BRIEF ON LAW IN SUPPORT OF PLAINTIFFS' FRANK'S CHALLENGE TO FROST'S AFFIDAVITS OF NOVEMBER 19, 1993 BASED ON COLLATERAL ESTOPPEL

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, MARK B. RASMUSSON, DEBORAH L. RASMUSSON, ANDREW A. GANTKESSY, and RASMARK JET CHARTER, INC., Plaintiffs in the above styled and numbered cause, by and through their undersigned attorney of record, and submit their Brief in Support of Plaintiffs' Opposition to Qualified Immunity and as grounds would show the Court as follows:

STATEMENT OF RELEVANT FACTS

1.

On September 19, 1990, Mark B. Rasmusson was indicted, along with Jesus Flores, in Count Nine of Superceding Indictment, Criminal Number EP-90-258H.

2.

Count Nine alleges:

> "'Jesus Armando Flores, did use and cause to be used a facility in interstate or foreign commerce, that is, an airplane, from the City of El Paso in the State of Texas, to the Cities of Orlando and Miami in the State of Florida and divers other places, with the intent to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, being Conspiracy to possess with intent to distribute a controlled substance, to wit: cocaine, in violation of 21 U.S.C. § § 846 and 841(a)(1), and thereafter did perform and attempt to perform acts to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity all in violation of 18 U.S.C. §§ 1952(a)(3) and
>
> 2. That Defendant, Mark Rasmussen [sic], aided, abetted, counseled, induced and procured the commission of the offense alleged above, in violation of Title 18, United States Code, Section 2."

3.

The foundation of the Government's case against Mark Rasmusson was the DEA's investigation as reported through the DEA Reports of Investigation (DEA-61s) and the testimony of witnesses whose alleged statements were reported in the DEA-6's.

4.

Statements pertaining to the use of Rasmark charter services by Flores, or his associates, were reported in the DEA-6 consisting of the

post arrest statements of Luis A. Garcia. See Appendix E, Exhibit 7, Paragraph 11.c-i.

5.

Statements pertaining to the use of Rasmark charter services by Flores, or his associates, were reported in the DEA-6 consisting of the Debriefing of Peter Seaverns. See Appendix E, Exhibit 9, Paragraph 12 and Exhibit 16 following DEA-6 interview of Mark and Debra Rasmusson, DEA-6, Paragraphs 9-11 and 17).

6.

The Court made a favorable ruling for Rasmusson. The Court states:

> [t]he elements of that offense are: first, that the defendant, whichever the defendant was, used a facility in interstate or foreign commerce; second, that it was used with the intent to promote, manage, carry on etcetera, the illegal activity, specifically conspiracy to possess drugs with intent to distribute; and third, that thereafter the defendant performed or attempted to perform acts which did promote, establish, manage and carry on, etcetera, the illegal enterprise. The fault I can see in the proof on that count is not all of this talk about who had knowledge of what when, but just there's not sufficient proof that those trips, suspicious as they might be, were for those purposes or that thereafter those acts were performed. Suspicion, of course, is not enough. The test is proof beyond a reasonable doubt. So the motions for acquittal by the two defendants named in Count Nine will be granted. That count will be removed from the jury's consideration...

See Appendix F, Vol. II, Exhibit 61.

7.

Defendant Frost, in the present case, states in his two affidavits dated November 19, 1993 that he reviewed all of the DEA Reports of Investigation and the criminal trial transcript as part of his preparation of his affidavits in support of probable cause to obtain the search warrants.

ARGUMENT AND AUTHORITIES

8.

The question presented is whether the issues of evidentiary and ultimate facts in the dea-6's were either fully prosecuted, or could be deemed fully prosecuted, in the government's case in chief against Mark B. Rasmusson as basis for judgment of acquittal such that the principle of collateral estoppel should apply to prevent these evidentiary and ultimate facts from being used again in affidavits for search warrants leading to subsequent criminal prosecution.

The United States Supreme Court rules on the issue of "'collateral estoppel" in *Ashe v. Swenson*, 397 U.S. 436 (1970). The facts in *Ashe* concern a defendant (three or four men robbed six poker players; in the first trial, the victims were unable to identify the defendant) who the jury found not guilty due to insufficient evidence; in a second prosecution, after denial of defendant's motion for dismissal based on acquittal, defendant was tried for having robbed another poker player and was convicted. In the second trial, the witnesses were for the most part the same, but this time their testimony was substantially stronger on the issue of the defendant's identity, resulting in a conviction. In *Ashe*, the witnesses refined their testimony against the defendant, giving more details of their description of him. The similarity between the Ashe case and the present case is the use by Defendant Frost of the same issues of ultimate facts that are contained in the DEA-6's and the criminal trial transcript, that were the basis of the previous prosecution, in his two affidavits of November 19, 1993 to give the appearance of probable cause to launch a subsequent prosecution. An

additional similarity to Ashe is Defendant Frost's attempt to make stronger the criminal nexus by attributing to the DEA-6's numerous misrepresentations and fabrications that are not supported in any part of the DEA6's or the criminal trial transcript.

9.

To determine issues of Ultimate Facts, the present Court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Id., at 444.

10.

In reviewing Count Nine of the Superceding Indictment, the following issues of ultimate facts are alleged: that Mark Rasmusson used Rasmark aircraft in interstate or foreign commerce for the purpose of aiding, abetting, counseling, inducing and procuring the promotion, management, establishment, and carrying on of Jesus Flores conspiracy to poss ess and distribute cocaine from the City of El Paso in the State of Texas, to the Cities of Orlando and Miami in the state of Florida and divers other places.

11.

Comparing Count Nine with what Defendant Frost alleges in his two affidavits, it becomes quite obvious that drug smuggling and money laundering are among the specified unlawful activities being alleged by Frost. For example:

(1) In Paragraph 122 Frost alleges,

> Based on the statements made by witnesses such as Rasmark Jet Charter office staff, documentary evidence found in the residental trash, as well as Debra

> Rasmusson's statements to DEA Special Agents regarding maintaining records at her home and my experience which indicates that persons engaged in money laundering and currency manipulation violations, I believe that there are accurate records of unlawful transactions kept by these persons in various formats and in what they believe to be safe locations such as their home and businesses.

(2) In Paragraph 124 Frost alleges,

> I believed [sic] that based on the statements of Debra Rasmusson and the association of the Rasmussons with known controlled substances traffickers such as Jesus Flores and Hector Barrera there is probable cause to believe that the Rasmussons have in the past and are utilizing Rasmark Jet Charter to facilitate the transportation and laundering of the proceeds in trafficking in controlled substances;

(3) In Paragraph 127 Frost alleges "[t]he Mail Fraud allegations as well as trafficking in controlled substances are "specified unlawful activities' as defined in Title 18 United States Code section 1956."

12.

An examination of the DEA-6's reveals that the reported statements pertaining to the Rasmussons and Rasmark relate to drug smuggling activities:

(1) One example is in Appendix E, Exhibit 7, Paragraph 11e, SA Perkins reports that Luis Garcia said Jesus Flores, Arturo Bermudez and Mike Villalba arrived at Rasmark Jet Charter, Inc., and met with Joe Peake and the

> Colombian male in the airplane hangar area. . * * f. Both pilots seemed to know Joe Peake and called him

> by his first name . . . . The Colombian male did not say much during the flight and Peake said that the Colombian was nervous because he was illegally in the United States . . . the Colombian, and the two pilots had two rooms approximately three floors below Garcia's room . . . According to Garcia, they flew out of Miami at about 2:00 PM . . . Peake and Garcia were picked up at Rasmark Jet Charter, Inc., by Peter Seaverns and Gerd Schmidt . . .

13.

(2) Another example is in Appendix E, Exhibit 16, (the DEA-6 following the DEA-6 Interview of Mark and Debra Rasmusson) regarding Debriefing of Peter Seaverns on August 29, 1990, Paragraph 10, Seaverns reportedly said, "[t]hat he told Mark Rasmussen, [sic] 'you'd better be careful if you're flying Jesse and his people around'. Seaverns was once asked by Mark and Debbie Rasmussen about Flores being a doper. Seaverns said he told them indirectly that Flores was a doper but Rasmussen was 'hiding his head in the sand.'"

14.

The trial testimony further demonstrates that the ultimate issues that are in the DEA-6's were either fully prosecuted by the Government, or should be deemed fully prosecuted. For example, DEA SA Perkins testified to going to Rasmark on August 23, 1990, that he met with Debra Rasmusson and Mark Rasmusson, that he asked for any records and documents and any information he could give concerning flights taken by Flor es or his people or his associates. See Appendix F, Vol. I, Exhibit 41, Page 718, L12 - Page 719, L25. Perkins further testified to the one telephone call made by Flores to Rasmark, out of thousands of telephone calls that were monitored by the Government wiretaps. See Appendix F, Vol. II, Exhibit 43, Page 762, L8 - Page 763, L19).

15.

In further support of the Plaintiffs' position, the criminal trial transcript reveals that the remaining Government witnesses in its case in chief against Mark Rasmusson also made alleged statements to DEA SA Perkins and were reported in the DEA-6's. They were: (1) Jim Edward Young, former Rasmark pilot (Appendix E, Exhibit 15); (2) Deborah Rasmusson, wife, employee, and coowner of Rasmark (Appendix E, Exhibits 8, 15, 16); (3) Jerry Burnett, former Rasmark pilot (Appendix E, Exhibit 13; (4)Albert Apodoca, Certified Public Accountant who did Rasmark taxes and other financial work (Appendix E, Exhibit 14); (5) David Chavez, former Rasmark dispatcher (Appendix E, Exhibit 10); and (6) Suzanne Zaldivar, former Rasmark employee (Exhibits 12, 17). Coconspirator Peter Seaverns also testified; however, he was not asked any questions pertaining to his reported statements in the DEA-6's, the Rasmussons or Rasmark (Appendix E, Exhibits 9, 11, 16).

16.

With regard to evidentiary facts, the Court in *Wingate v. Wainwright*, 464 F.2d 209, 215 (5 th Cir. 1972) expanded the principle of collateral estoppel to include evidentiary as well as ultimate facts because

> [i]t is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime.

A review of the two Frost's affidavits of November 19, 1993 would reveal the evidentiary facts that he uses from the DEA-6's are the same evidentiary facts that the Government used in its prosecution against Mark Rasmusson.

17.

In Paragraph 10 Frost begins to incorporate evidentiary facts from the DEA-6's into his affidavit. First, he refers to SA Perkins' reported statements of Debra Rasmusson from the interrogation on August 23, 1990: (1) Perkins asked Debra Rasmusson if she knew that Jesus Flores was a controlled substance trafficker, Debra Rasmusson reportedly stated that she thought Flores was a "'hit man"; that Flores always paid in cash; that they took Flores all over the country; Flores seldom took luggage; Rasmark never transported freight for Flores; sometimes Flores would send Joe Peake to pay the bill in cash; that original documents were at home; and so (for DEA-6 see Appendix E, Exhibit 8, Paragraphs 3-5). The evidentiary fact that Perkins is attempting to establish is "knowledge" on the part of the Rasmussons of Flores' criminal activity, and the Government attempted to prove this element of "knowledge" at the criminal trial. However, the Court rejected the Government's position and stated "The fault I can see in the proof on that count [9] is not all of this talk about who had knowledge of what when, but just there's not sufficient proof that those trips, suspicious as they might be, were for those purposes or that thereafter those acts were performed. See Appendix F, Vol. 11, Exhibit 61.

18.

Further support for the Plaintiffs' position that Frost uses the same evidentiary facts already prosecuted is found in Paragraphs 11-12, 14-16, where Frost reviews the DEA Administrative Subpoena issued to Rasmark on August 24, 1990 (Appendix E, Exhibit 12); Frost raises the issues of Deborah Rasmusson being unable to locate Rasmark copy of Flores' invoices and the reconstructed invoices. For the DEA-6's pertaining to Deborah Rasmusson see Appendix E, Exhibits 8, 15, 16. The Government called Deborah Rasmusson as a witness and examined her fully pertaining to the missing invoices, pilot duty time sheets, manifests, and the subsequent reconstructed invoices (Appendix F, Vol. II, Exhibits 46-47). Not only was the Government trying to prove "knowledge" but also the issue of "participation" by the Rasmussons in promoting or otherwise aiding, abetting, counseling or protecting Flores'

organization. Of course, the Court rejected the Government's evidence, as shown above in Paragraph 19.

19.

In Paragraphs 13, 17 of Frost's affidavits, Frost refers to the DEA-6 pertaining to Susana Zaldivar on the keeping of Rasmark files and invoicing procedures. For the DEA-61s pertaining to Zaldivar, see Appendix E, Exhibit 17. Likewise, Zaldivar testified at the criminal trial on the same issues (Appendix F, Vol. II, Exhibit 54).

20.

Frost continues, in Paragraphs 18-20 of his two affidavits, with Jerry Burnett, a former Rasmark pilot who also testified at the criminal trial. Frost alleges: that Burnett was the chief pilot since mid 1989; that he was interviewed by DEA on August 26, 1990; that he had been the pilot on at least three Flores flights chartered into Mexico; that on one occasion they picked up additional passengers in Mexico and that these people were armed with rifles and semi-automatic handguns who he believed were the Mexican Judicial Police; that he went to Mark and Debra [sic] Rasmusson and reported unusual events of flight into Mexico with Flores; that Mark and Debra Rasmusson and Burnett concluded that Flores was in the illegal drug business; that he, Burnett, had several conversations with the Rasmussons regarding Flores and "his people" being in the drug business and that both Mark and Debra Rasmusson told him Burnett, that they knew that Flores was in the drug business and so on. For the DEA-61s pertaining to Burnett, see Appendix E, Exhibits 13, 16. The Government called Burnett as a Government witness and examined him fully on each flight that he did for Flores and on what occurred during the flights (Appendix F, Vol. II, Exhibits 48-49). Obviously, "knowledge" and "participation" were the evidentiary facts the Government was attempting to prove; however, the Court rejected their proof (see Paragraph 19 above).

21.

Frost continues his review of the DEA-6's, in Paragraphs 21-22 and 24, with the report pertaining to the accounting firm of Apodoca and Jensen who performed all of the accounting functions, including taxes. Frost states that Apodaca [sic] told Perkins that Mark Rasmusson came to Apodaca and said he wished to amend his May, 1990 financial report to include $11,000.00 cash transaction; that Apodaca was alarmed by Mark Rasmusson's statements and requests to him; and so on (for DEA-6 see Appendix E, Exhibit 14). The Government also called Albert Apodoca as a Government witness and examined him fully (Appendix F, Vol II., Exhibits 50-51). Again, the evidentiary fact of "knowledge" of and "participation" in Flores' organization were the aim of the Government's proof which failed (see Paragraph 19 above).

22.

Lastly, Frost sneaks in Paragraph 26 a statement that Mark Rasmusson was introduced to Jesus Flores by Peter Seaverns. No where in the DEA-6's is this statement supported; however, there were statements showing the use of Rasmark charter services. For the DEA-6's pertaining to Seaverns, see Appendix E, Exhibits 9, 11, 16 (following the DEA-6 interview of Mark and Deborah Rasmusson and Jerry Burnett). To further cement the Plaintiffs' position, Peter Seaverns, a co-conspirator of Flores, did testify during the criminal trial and the Government chose not to question him on the incriminating statements allegedly made about the Rasmussons and Rasmark, and these evidentiary facts should be deemed prosecuted. See Appendix F, Vol. I, Exhibit 19.

23.

It is without question that Defendant Frost, and his co-conspirators, were attempting to bring about another criminal prosecution against either of the Rasmussons and Rasmark. The Supreme Court has always recognized a distinction between governmental action intended to punish and that which is not. See

United States v. Halper, 490 U.S. 435, 446-448 (1989)r holding that Double Jeopardy Clause is implicated when a civil fine is punitive. Defendant Frost simply sought to use the DEA6's to create an appearance of a criminal nexus where there is none. The Government tried to do the same thing during the criminal prosecution against Mark Rasmusson in 1990-1991. The Court emphatically stated that "[t]he fault I can see in the proof on that count [9] is not all of this talk about who had knowledge of what when, but just there's not sufficient proof that those trips, suspicious as they might be, were for those purposes or that thereafter those acts were performed. Suspicion, of course, is not enough. The test is proof beyond a reasonable doubt . . . ."

CONCLUSION

24.

The Plaintiffs have demonstrated that the evidentiary and ultimate facts in the DEA-61s were either fully prosecuted, or should be deemed fully prosecuted, through the Government witnesses, all current and former Rasmark employees except for DEA SA Perkins and Albert Apodoca, Rasmark accountant. The principle of collateral estoppel should apply because the Government should not be permitted to make repeated attempts to convict or indict from use of discredited facts and no independent evidence of any criminal nexus pertaining to the Plaintiffs outside of the discredited facts, thereby subjecting the Plaintiffs to unending embarrassment, expense and ordeal and compelling them to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though they are innocent they may be found guilty.

Moreover, at the very least Frost should have stated in his affidavits that the information that he relied upon in the DEA6's was completely discredited by witnesses testimony in the criminal prosecution of Mark Rasmusson. Frost improperly misled the Magistrate into believing that there existed a criminal connection or association between Mark Rasmusson and Jesus Flores. This inference was completely discredited at the criminal trial of Mark Rasmusson.

WHEREFORE, the Plaintiffs have demonstrated that the question whether the issues, of evidentiary and ultimate facts in the DEA-6's that were either fully prosecuted, or could be deemed fully prosecuted fully prosecuted, in the Government's case in chief against Mark B. Rasmusson, as a basis for the Judgment of Acquittal, should be answered in the affirmative for the Plaintiffs. Therefore, Plaintiffs request the principle of collateral estoppel be applied to all of the evidentiary and ultimate facts that are contained in the DEA-61s, criminal trial transcripts and any other documents related to the criminal prosecution of Mark B. Rasmusson in 1990-1991.

Respectfully submitted,

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Filed June 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

MARK B. RASMUSSON, ET AL,	§	
	§	
PLAINTIFFS	§	
	§	
	§	CIVIL ACTION:
	§	EP-95-CA-475-F
VS.	§	JURY DEMAND
	§	
LAWRENCE E. FROST, ET AL,	§	
	§	
DEFENDANTS	§	

MOTION FOR NEW TRIAL AND BRIEF

COME NOW PLAINTIFFS, Mark B. Rasmusson, et al., by and through their undersigned attorney of record and pursuant to Rule 59 of the Federal Rules of Civil Procedure file their Motion For New Trial. In support, Plaintiffs show the court as follows:

INTRODUCTION

1. On May 27, 1997, the Court filed its Memorandum Opinion and Order ("MEMO") dismissing Plaintiffs' claims "en toto". Plaintiffs object to the Courts' MEMO implied Findings of Fact and Conclusions of Law[1]

Fn 1. In Douglass v. United States Auto. Ass'n, 79 F.3d 1415 (5th Cir.1996) en banc revisited its standard for review of motion for new trial based on manifest injustice and plain error. The court overruled its former holding in Nettles v. Wainwright, 677 F.2d 404 (5th Cir.1982)(en

MANIFEST ERROR OF FACT

2. The Court states:

> The complaint in this action reads more like a script for an Oliver Stone movie than a suit for civil damages[2].

3. Although Plaintiffs object to the application of the heightened pleading standard, Plaintiffs have complied with this the standard as announced in Elloitt v. Perez[3]. The U.S. Supreme Court partially overruled *Elliott*[4] heightened pleading standard as to municipalities in Leatherman v. Tarrant county Narcotics Intelligence and Coordination Unit[5]. The Court states:

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banc) approving a waiver rule applied to unobjected-to proposed factual findings and legal conclusions but only applicable to factual findings as a forfeiture of the right to raise any objection on appeal to such factual findings for which no objection was entered in the district court. In Hardin v. Wainwright, 678 f.2d 589, 591 (5th Cir.1982) stated: "[the failure to object *no longer waives* the right to appeal but simply limits the scope of appellate review of factual findings to plain error review; no limitation of the review of legal conclusions results". The court in *Douglass* overruled the forfeiture rule applied in *Nettles* and its progeny and held that a party's failure to file written objections within 10 days shall bar that party from attacking on appeal the unobjected-to factual findings and legal conclusions provided that the party was served with notice that such consequences will result from failure to object. (Footnote omitted) Id. At 1428-1429.

FN 2. MEMO at p.2

FN 3. Elliott v. Perez, 751 f.2d 1472, 1480-82 (5th Cir. 1985)

FN 4. Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit, 113 S. Ct. 1160 (1993).

FN 5. 113 S. Ct. 1160 (1993)

> Loud cries of "conspiracy and cover-up" reverberate throughout hundreds of pages of allegations. Accused of wrongdoing is a legion of law enforcement officers, from the top brass in our nation's capital to the foot soldiers working the beat day in and day out, all allegedly ensnared in a conspiracy web so broad that the court is left to wonder how and why so many could and would have conspired so long to harm so few[6].

4. The Court states:

> Nonetheless, the court has been patient with Plaintiffs, giving them every opportunity to show, somewhere in the vastness of their presentation, that some kind of cognizable action does exist. No showing has been forthcoming; thus, for the reasons stated herein, Plaintiffs' claims are dismissed *en toto*[7].

5. Plaintiffs requested 45 days within which to complete and file their Third Amended Complaint. The Court granted Plaintiffs only 30 days for reasons not specified in the Court's Order. Within the 30 day period, Plaintiffs could only complete a draft of the Third Amended Complaint which was filed timely. Plaintiffs attempted to correct errors and more specifically bring into focus Plaintiffs allegations and specific facts supporting Plaintiffs' claims for relief. However, due to a

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FN 6. MEMO at p.2 Indeed, Plaintiffs have asked this question requesting Defendants during depositions to reveal the facts that led to Defendants' decision to conduct an investigation of Plaintiffs in the first place. That high level customs officials engaged in a cover-up and a directed a conspiracy against Plaintiffs should be no surprise given the propensity of Customs managers to lie to senators, or to steal files from the GAO office which was investigating Customs, or where the Clinton Transition team proposed that Customs be completely dismantled because it was beyond any possibility of accountability or control.

FN 7. MEMO at p.2

misunderstanding, Plaintiffs did not file a motion for leave of the Court to file the corrected Complaint and the Court admonished Plaintiffs' Counsel and ordered the corrected Third Amended Complaint struck. Therefore, the Court cannot reasonably claim that it gave Plaintiffs every opportunity to establish facts that show they are entitled to the relief requested. Despite these circumstances, Plaintiffs Third Amended Amended Complaint states more than enough facts which if proved at trial would establish that Plaintiffs are entitled to relief.

6. In the language of the Court:

> To fully understand the issues at hand, one must travel back in time to the turn of this decade. The place is El Paso, Texas; the time, circa 1989. A drug enforcement task force came into existence. When and how is not particularly relevant to the case at hand. Its objective was to investigate drug trafficking and money laundering between the United States and Mexico. The focus of this task force quickly became Jesus Flores, a Mexican national residing in El Paso, and his associates. Flores, who owned a remodeling business in El Paso, was suspected of running a large scale drug operation[8].

7. Plaintiffs agree that it is essential to review the facts that were known to Defendants going back to 1987. However, only incidents of harassment of Plaintiffs was by customs inspectors prior to 1989. In 1989 Mark Rasmusson came to the attention of Acting Customs Commissioner Mark Lane[9].

8. The Court states:

FN 8. MEMO at pp.2-3.

FN 9. Appendix D Volume I Exhibit 6H letter from Michael H. Lane to Senator Lloyd Bensten regarding Mark and Deborah Rasmusson.

> As the investigation progressed, task force members became aware that Flores was relying on Rasmark Jet Charter, Inc., a charter company owned by Plaintiffs Mark and Debra Rasmusson, for his transportation needs. Rasmark, and both Rasmussons, naturally became targets of the investigation, albeit never its primary targets.

9. The Court mischaracterizes the facts by implying to the reader that Rasmark was the only air transportation company useD by Flores. Nowhere in the evidence at Mark Rasmusson's trial did any informant, federal agent or anyone else testify that Flores relied on Rasmark for his "transportation needs"[10].

> As the Plaintiffs tell it, they became the subjects of around the clock harassment by the Customs Service. Their planes were constantly being searched, even when no international flights were made, and their pilots constantly questioned and harassed.

10. This statement by the Court is a complete and gross misstatement of the facts. Prior to March, 1992, Rasmark aircraft were intensely searched by Customs inspectors or agents at port of entries on every occasion that Rasmark Aircraft had to return from foreign a country[11]. While it is true that Rasmark aircraft were constantly being searched and their pilots were constantly questioned and harassed when returning from foreign countries, it is not true that prior to March, 1992, that their planes were constantly being searched when "no international flights were made...". Plaintiffs allege two warrant-less searches of their aircraft prior to March, 1992. In 1988, Rasmark pilot Jerry Burnett was stopped in Brownsville, Texas at gunpoint and detained for several

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FN 10. United States v. Jesus Flores et al., EP-90-CR-258-H.

FN 11. See Appendix A Exhibits 6, 6A through 6H which specifies the Rasmussons' complaints to senators and to Customs officials regarding Customs inspectors "Gestapo tactics".

hours while federal agents searched his aircraft without a warrant. Again in 1990, Mr. Burnett was detained by federal agents when he landed in El Paso[12].

11. The Court States:

> The Rasmussons are under the misimpression that the FF began its investigative activities of them and of Rasmark in 1990. That is not the case. The Task Force conducting the Flores investigation was not the same Task Force in charge of investigating the Rasmussons. Although both Task Forces were certified as Organized Crime/Drug Enforcement Task Forces, the FTF came into existence in March 1992.

12. Plaintiffs were never under any misimpression regarding the various task forces referred to by the Court. Plaintiffs discovered that during the period that the DEA Task Force was investigating Flores and Plaintiffs that a parallel investigation by Customs agent Peterson was being conducted[13]. It is interesting to note that Defendant Schroeder was assigned as Customs representative to the DEA task Force in the period 1985-1991. Defendant Schroeder states in his Deposition that he was in charge of the Rasmark portion of the larger money laundering investigation[14]. Defendant Frost admitted that the larger money laundering investigation was directed at Guillermo Portillo[15]. Defendant Frost stated in his deposition that Mark Rasmusson and Rasmark were targeted because an informant alleged that Mark Rasmusson knew a

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FN 12. See Plaintiffs' Third Amended Complaint paragraphs 36-45.

FN 13. See Deposition of Defendant Frost at pp.18-19.

FN 14. See deposition of Defendant Schroeder at pp.14-15
Also see Deposition of Defendant Lenox at pp. 40.

FN 15. See Deposition of Defendant Frost at pp.18-19.

person who knew a person who was close to Mr. Portillo[16]. None of the twelve individuals deposed could point to a single incident or any evidence that Plaintiffs committed any crime or were about to commit a crime[17]. Although the basis of the Portillo investigation is an important issue as to whether Defendant were entitled to qualified immunity, every attorney for the Defendants objected strongly regarding any questions by Plaintiffs Counsel regarding Mr. Portillo[18]. Defendant Frost conclusion that Mark Rasmusson is associated with Hector Saenz in a money laundering scheme is complete fantasy. There is no direct or circumstantial evidence that would connect Mark Rasmusson to criminal activity by Flores or any of his associates. This is the exact reason that Judge Hudspeth acquitted Mark Rasmusson because the government and Defendant Frost failed to establish any direct or

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See footnote 19.

FN 17. See Frost Deposition pp.18-20, 81-82, 111-112; Lenox Deposition pp.16-17; Salas Deposition p.84; Hivick Deposition pp.15-16,25-29,43-45; Schroeder Deposition pp.28-29, 25-27; Holland Deposition pp.28, 30, 52, 41, 60, 90; Mills Deposition pp.90-91; Acosta Deposition pp.93-95; Reay Deposition pp.115-119; Wilczewski Deposition pp.90-93,111; Baker Deposition pp.26,42-43,46-50,53-55, 58-60; Beach Deposition pp.41-43.

FN 18. An FBI source allegedly stated Pete Seaverns introduced Jesus Flores to Mark Rasmusson. Flores was involved in money laundering with Hector Saenz-See Frost Deposition at p.43 lines 7-19. The FBI source alleged to have stated that Mark Rasmusson was buying aircraft parts with proceeds from trafficking and controlled substances. Id. p.43 lines 13-16. (These allegations of Mark Rasmusson money laundering for Flores were completely discredited at the witness testimony during Flores trial.) Defendant Frost states he has circumstantial evidence that Mark Rasmusson associates with Hector Saenz. Id. P.45 lines 11-15. Defendant Frost states the Hector Saenz is associated with Guillermo Portillo Corral who has a business association with Mark Rasmusson. Id. P.45 at lines 18-22. For typical objection see Acosta Deposition at p.18 l.8-18.

circumstantial evidence that Mark Rasmusson engaged in any criminal activity with Flores or with Hector Saenz, or with Guillermo Portillo[19].

13. The Court refers to focus of the FTF as created for the purpose of investigating large scale money laundering operations in the El Paso Juarez area[20]. However, the Court again completely misstates the facts. The Court states:

> Here, too, the Task Force became aware that Rasmark was providing transportation services to members of that organization, and began investigating Rasmark and the Rasmussons for possible connections[21].

14. The Court refers to "members of that organization". The Court does not name Portillo. Presumably the Court is referring to Portillo because all of the Flores criminals are in jail and Mark Rasmusson could not possibly provide any "transportation services" for any of them. The true facts are that Mr. Portillo owned a Lear Jet aircraft identified as N7GP. Mr. Portillo contracted for Rasmark to provide aircraft maintenance, two pilots, hanger space and Rasmark would use Mr. Portillo's aircraft for charter trips and pay Mr. Portillo an agreed to amount per air mile. However, Mr. Portillo failed to pay certain maintenance bills and Mark Rasmusson filed a lien against the aircraft in excess of $50,000.00. Mr. Portillo eventually paid off the lien and recovered his $4,000,000.00 aircraft[22].

15. The Court states:

FN 19. Id. p.46-47.

FN 20. MEMO at p.4

FN 21. Id.at p.4

FN 22. See Appendix DI Exhibits 11A through 11D. Plaintiffs' Third Amended Complaint at paragraphs 188-195.

> The investigation of Rasmark and the Rasmussons consisted of undercover surveillance work, interviewing former and current employees, interviewing the Rasmussons, conducting searches pursuant to search warrants, and requesting records from customers employing Rasmark[23].
>
> While circumstantial evidence linking the Rasmussons to the money laundering scheme was obtained[24], no charges were ever brought, and the Task Force was decertified as an Organized Crime/Drug Enforcement Task Force sometime in 1994[25].

16. The Court appears to be including investigation interviews from the Flores case as part of its basis for the above statements. No circumstantial evidence was developed by the FTF nor by Defendants that connected Mark Rasmusson to any criminal activity what so ever[26].

17. The Court states:

FN 23. During the period March, 1992, through December, 1993, Mark Rasmusson was never interviewed by any federal agent(s). Agents interviewed Deborah Rasmusson in May, 1992. See Plaintiffs' Third Amended Complaint paragraphs 199-248. Agents attempted to interview Deborah Rasmusson in November, 1992, after the agents seized her vehicle without a warrant. See Id. Paragraphs 263-270.

FN 24. The Court's reliance on Defendant Frost's statements regarding circumstantial evidence of money laundering is unjustified. As previously shown in footnote 18, Mark Rasmusson merely knowing or having a business relationship with Mr. Portillo is not any evidence what so ever that Mark Rasmusson was engaged in money laundering with Hector Saenz.

FN 25. MEMO at p.4.

FN 26. See footnote 18.

> Although the complaint reads as though each Plaintiff asserts each claim against various Defendants, that is not, in fact, the case[27].

18. The Court states:

> First, Plaintiffs allege that all Defendants except for Hallett, Weise, Hensley, Samaniego and Leach have conspired to deprive them of their constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments[28].

19. On April 21, 1997, the Court held a hearing on the issue of defendants' motions for qualified immunity. The original format was to be in the form of oral argument as in a case before a court of appeals. However, the Judge changed the format a few days prior to the hearing. The Court stated that format would be for the Court to ask question directed at Plaintiffs' counsel. However, instead of each defendant's attorney meeting their burden and stating their position on the legal issues, Judge Furgeson proceeded to conduct a bench trial of the case. Judge Furgeson made factual determinations as to credibility of evidence, credibility of affidavits, and required Plaintiffs to come forward with evidence as if he was conducting a trial on the merits. In summary judgment proceeding, the judge is suppose to accept all non-moving party's evidence, affidavits and allegations as true. Judge

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FN 27. It is Plaintiffs intention that each Plaintiff asserts each claim against specific defendants as noted in Plaintiffs' several causes of action in their Third Amended Complaint.

FN 28. Plaintiffs inadvertently omitted the names of Hallett, Weise, and Hensley from the conspiracy alleged in Count I of Plaintiff's Third Amended Complaint. Facts supporting Plaintiffs' conspiracy theory are in Plaintiffs' Third Amended Complaint paragraphs 365 through 395 and documents in support of these paragraphs are in Appendix B Exhibits 1 through 20. However, in Plaintiffs' Count VIII Defendants Hallett, Weise and Hensley are named as co-conspirators.

Furgeson did not make this assumption. Judge Furgeson was suppose to address only legal issues at the hearing and reserve factual determinations for the jury. On several occasions, Judge Furgeson took the position of acting as attorney for the Defendants. For example, Counsel attempted to present her evidence that Defendant Reay lied in his Deposition testimony regarding Operation Transwestern. Judge Furgeson responded as if he were Defendants' counsel. He advanced the theory that there could have been two Operation Transwesterns - one in El Paso and one in Albuquerque. Nowhere in any document or in any Defendant affidavit did anyone state there were two operations named Transwestern[29]. Defendant Lappe's memorandum on Desk Audit of Ward Olson is dated April 16, 1992. This date is a month after the FTF was formed. Judge Furgeson requested Counsel produce proof regarding operation Transwestern. Had the Court informed Plaintiffs' Counsel that proof was going to be required, Counsel would have brought proof. For example, Operation Transwestern was the subject of several newspaper

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FN 29. Operation Transwestern was so named because it involved the use of an airstrip at Mountainair, NM near Albuquerque, NM owned by the Transwestern Gas transmission company. Group Supervisor Ward Olson was in charge of this operation. Mr. Olson became a whistleblower regarding illegal conduct of Michael Lappe the SAC. Mr. Olson provided Plaintiffs with a copy of his Office of Inspector General investigation file and copies of numerous letters and memorandum regarding complaints to Senators, Treasury OIG investigators, and Customs Internal Affairs which were obtained through the Freedom of Information Act prior to the date Plaintiffs filed their original petition. Among Mr Olsons documents was evidence that SAC Lappe violated federal law in transferring money from Operation Transwestern to a "money 'aundering investigation in El Paso". It was on this issue that Defendant Reay lied in his Deposition when he testified that Rasmark case was adopted as part of the Transwestern case. See Reay Deposition at pp.43-51, 105 at l.14, 116-118. See Supplemental Appendix DI Exhibit 45 Memorandum from Michael Lappe to Director, Office of Domestic Operations dated April 16, 1992. Nowhere does the name Mark Rasmusson, Deborah Rasmusson or Rasmark Jet Charter appear.

articles in 1990 and 1991. Attached hereto is a copy of a newspaper article that appeared in the Albuquerque Journal on October 24, 1995. See Exhibit 1 attached hereto[30].

> Oral argument on all outstanding motions was heard by the court in El Paso on April 21, 1997. What became clear at the April 21st hearing is that the Plaintiffs, in essence, are complaining of being the targets of a criminal investigation that failed to produce evidence of indictable wrongdoing. Their complaint is that the investigation took too long and resulted in the loss of business and employment[31].

20. As noted above, the April 21, 1997, hearing was not in oral argument format. Plaintiffs complain that the ten year investigation of Plaintiffs was unconstitutional by virtue of its scope, intensity and use of unconstitutional investigation techniques such as search and seizure

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FN 30. A copy of Exhibit 1 is Exhibit 14 in Plaintiffs' Second Amended Complaint Received by the Clerk on May 3, 1996. Had Plaintiffs been informed that the April 21, 1997, hearing was going to be a bench trial instead of oral argument on issues of law, Plaintiffs would have brought evidence supporting each of Plaintiffs claims against each individual defendant. Also see Appendix B Exhibit 3 the next to the last page which is a news article which contains Defendant Hallett's response to FBI Director Sessions admission that Defendant Lappe lied to reporters at a news conference pertaining to Operation Transwestern. The last page in Exhibit 3 is Exhibit 1 pages 17-18 attached hereto. Also see Appendix G Exhibit 7 which is the first Declaration of Defendant Reay which contains three paragraphs admitting Op Transwestern was closed, funds were transferred from Op Transwestern for "per diem expenses". The Rasmark case was completely unrelated to Op Transwestern which was an international cocaine smuggling sting operation not an "air transport initiative".

Fn 31. MEMO at p.7

without a warrant[32].

> Because the court considered various affidavits in coming to a decision, all motions to dismiss will be construed as motions for summary judgment[33].

21. The Court has not applied the correct legal standard for its view of Plaintiffs' Complaint, affidavits, and pleadings[34].

> Having considered all motions, oral argument, and relevant case law, the court is of the opinion that no genuine issues of material fact exist as to any of the claims asserted and that all named Defendants are entitled to summary judgment as a matter of law[35].

THE COURT HAS FAILED TO APPLY THE PROPER LEGAL STANDARD WHICH HAS CAUSED A MANIFEST INJUSTICE AGAINST PLAINTIFFS:

22. The Court delves into the case law pertaining to summary judgment and to qualified immunity throughout the MEMO pages 8 through 30 but does not tie any of the specifics to the Plaintiffs' or Defendants' pleadings, affidavits, depositions, admissions or any other evidence offered by either Plaintiffs or Defendants. The Court's MEMO has failed to meet the legal standard for reviewing Plaintiffs pleadings,

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FN 32. See Complaint pars.306-324; 67-86.

FN 33. MEMO at pp.7-8

FN 34. See footnote 36.

FN 35. MEMO at p.8. Nor does the Court state that it views the evidence on Plaintiffs as true and proceed to analyze whether summary judgment is proper based on that assumption.

affidavits, depositions, and complaint allegations as if true as a starting point in its analysis of defendants entitlement to summary judgment[36].

23. In the Court's MEMO p.7, the Court refers to Plaintiffs' reliance on 42 U.S.C. Section 1985 to state a cause of action for conspiracy. The only problem with the Court's analysis is that Plaintiffs did not invoke section 1985. Instead Plaintiffs allege a conspiracy pursuant to section 1983[37].

24. In ruling on Plaintiffs conspiracy claim, the Court's MEMO does not consider Plaintiffs continuing violation theory which specifically tolls the statute of limitations until such time as the violation is discovered. Defendants continued to unjustifiably retain Plaintiffs property for 18 months after it was taken.

25. The Court did not enter any finding on Plaintiffs motion to oppose Defendant Notice of Substitution. As Plaintiffs pointed out in their pleadings, the Federal Tort Claim Act does not preclude an action under the Bivens doctrine. Both can be asserted in the same lawsuit. Constitutional Torts under Bivens are specifically excluded as being actionable under the FTCA[38].

FN 36. In ruling on a motion for summary judgment, courts must view the evidence of the non-moving party as true and all doubts will be resolved in favor of the non-moving party. Likewise, all evidence will be construed in the light most favorable to the non-moving party and all reasonable inferences will be drawn in the non-moving party's favor. Eastman Kodak Co v Image Technical Services, Inc., 504 U.S. 451, 456 (1992); Matsushita Electric Industries, Co. V. Zenith Radio, 475 U.S. 574, 585-587 (1986); Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir.1990).

FN 37. See Pfannstiel v. City of Marion, 918 F.2d at 1187.

FN 38. See MEMO at pp.31-40; Plaintiffs' Opposition To Federal Defendants' Notice Of Substitution and Application for Order Thereon. The Court made no analysis of Plaintiffs' Opposition to which Plaintiffs

26. The Court's MEMO engages in a discussion of Plaintiffs' assertion of Constitutional deprivations of rights[39]. The MEMO Asserts that there is no causal connection between the Lappe letter to Ford and the termination of Gantkessy, and the termination of Ford's business relations with Rasmark. However, the Court failed to note that it specifically prohibited Plaintiffs from engaging in any course of discovery that would have revealed the causal connection. Plaintiffs alleged that the Lappe letter violated clearly established federal law as enacted in the Privacy Act[40] and violated due process and equal protection under the Fifth and Fourteenth Amendments.

27. The Court's MEMO regarding deprivations of Plaintiffs' Constitutional rights does not assume they are true then proceed to show any evidence offered by Defendants that would undermine Plaintiffs' claims. The Court states "[t]here is no evidence in the record that the termination of the relationship between the banks had anything to do with any visit by a federal agent..." This is not a correct statement[41].

28. Plaintiffs object to the Court's characterization that "At the hearing on the various motions, it became evidence that Plaintiffs have

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have filed a motion for reconsideration on this issue.

FN 39. MEMO at pp.41-50.

FN 40. Plaintiffs filed a separate appeal on the Privacy Act issue where the Court Denied Plaintiffs motion to add the U.S. Customs Service as a proper party. See Appendix DII Exhibit 20 which is a copy of the Lappe letter dated July 26, 1993.

FN 41. See Appendix DI Exhibit 9 where Texas Commerce Bank stated that termination of relations is based on "Past or ongoing investigations of borrower by regulatory agencies." Additionally see Appendix DII Exhibit 20A which is a copy of Ford memorandum pertaining to meeting between Ford executives and Defendant Schroder. Agent Schroeder is advising Ford as to how to proceed in the event Gantkessy sues Ford.

a fundamental misunderstanding of the right to association protected by the First Amendment"[42]. The Court required Plaintiffs to present evidence which Plaintiffs were not prepared to do at the hearing nor should Plaintiffs be required to present evidence where only issues of law should have been considered and oral argument on issues of law received by the Court.

29. The Court's statement "Plaintiffs complain of the execution of the November 22, 1993 search warrants and the collecting of trash from the Rasmusson residence." Plaintiffs have repeatedly complained that the November 22, searches were conducted without probable cause, that Defendants knew they had no probable cause on which to base a search warrant application, and the defendants retrieval of trash from the trash cabana attached to the residence required a search warrant[43]. Plaintiffs requested a hearing on these issues and the Court abused its discretion in failing to hear arguments of counsel which would have assisted the Court in making a just determination. The Court's failure to hear these arguments operated as a manifest injustice affecting Plaintiffs substantial rights.

30. The Court's MEMO states, "All three Defendants (Hallett, Weise, and Hensley) have sworn under penalty of perjury, that they have no personal knowledge of the facts at hand.[44]" Plaintiffs dispute the Courts Statement. Considerable evidence was adduced by plaintiffs that show a strong implication that Defendants Hallett, Weise and Hensley knew or should have known about the actions by Customs agents against Plaintiffs. Considering that these high level Customs managers had to approve the investigation and allocate funds to carry out the investigation it is reasonable to conclude these executives knew

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FN 42. MEMO at p.41.

FN 43. See Plaintiffs Brief in support of Frank's challenge to Frost's affidavits dated May 6, 1997; Also see Plaintiffs' Opposition to Federal Defendant Reply filed May 6, 1997.

FN 44. See MEMO p.51.

exactly what Defendants were doing. In the case of the seizure of a Rasmark Jet in Dallas on June 16, 1993, there had to be intervention by high level Customs officials to obtain the cooperation of multi federal agencies that participated in the seizure and search of the aircraft without a warrant[45].

PLAINTIFFS DISPUTE COURT'S CONCLUSIONS

31. THE COURT'S RULING THAT PLAINTIFF, RASMARK JET CHARTER, INC., CANNOT MAINTAIN A CLAIM UNDER EITHER BIVENS OR § 1983 OR BIVENS IS CLEAR ERROR OF LAW.

By its terms § 1983 authorizes the assertion of a claim for relief by "any citizen of the United States or other person within the jurisdiction thereof..." Whether a litigant is a citizen or other person authorized to assert a claim for relief under § 1983 depends upon the meaning and intent of the statutory language. Businesses are "other persons" authorized to assert claims under § 1983.[46]

32. THE COURT'S RULING THAT THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE FIRST AMENDMENT IS CLEAR ERROR OF LAW.

A fair reading of the plaintiffs complaint shows Plaintiffs Mark B. Rasmusson, Deborah L. Rasmusson and Rasmark Jet Charter, Inc. began complaining about harassment from the government and unreasonable searches and seizures as far back as 1989 and culminating in the filing of their lawsuit on November 21, 1995. Clearly, the

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FN 45. See Appendix DII Exhibit 14; Appendix B Exhibits 1 through 20; FOOTNOTE 9.

FN 46. San Bernardino Physician's Servs. Medical Group v. San Bernardino, 825 F.2d 1404, 1407 (9th Cir. 1987) (corporation is person within meaning of due process clause and § 1983)

Rasmussons and Rasmark actively particiated in forming the complaint committee in May 1989, along with other pilots, to specifically to complain about the Customs inspectors. When the harassment and unreasonable searches and seizures continued subsequent to that meeting, the Rasmussons, and Rasmark, complained to Edward Kennedy, a U. S. Senator, who forwarded the complaint to the Senate Finance Subcommittee over Customs. The Subcommittee through Senator Bentsen forward the complaint to Customs Headquarters in Washington, D.C., causing the Commissioner's office to investigate and respond. Furthermore, the Rasmussons sent their complaint to the District Director's Office in El Paso, Texas, causing the District Director to respond. Subsequent to these complaints, the harassment and unreasonable searches and seizures against the Rasmussons and Rasmark accelerated, culminating in the filing of the present lawsuit. Plaintiffs are essentially alleging that because of these initial complaints against the federal government Customs Service, the Rasmussons and Rasmark were unfairly targeted for continuous investigation in retaliation for exercising their First Amendment rights in opposing the treatment they received from the Customs Service. The Defendants were acting under color of federal, and later both federal and state, law; the plaintiffs' complaints were protected under the first amendment; and the plaintiffs' exercise of their protected right was a substantial or motivating factor for defendant's actions. See Rolf v. City of San Antonio, 77 F.3d 823, 827.

32. THE COURT'S RULING THAT THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE FOURTH AMENDMENT IS CLEAR ERROR OF LAW.

Material factual disputes exist. First, Defendant Salas testified that subsequent to the May 23, 1992 incident that he met Deborah Rasmusson for the purpose of returning her house keys to her. See Deposition of George Salas, January 10, 1997, Page 79, L3-12. This testimony conflicts with Salas' earlier testimony where he testified that Deborah Rasmusson never gave her keys to him for the purpose of borrowing her Mercedes. Deborah Rasmusson states in her affidavit

that her key chain included all of her house keys: master bedroom, office keys, filing cabinet keys, safe key, keys for her Grand Marquis car. She further states that it was after the occasion of Salas borrowing her car that she began noticing unusual happenings in both her home and office. See Deposition of George Salas, January 10, 1997, Page 38, L3-7. See Affidavit of Deborah Rasmusson, Plaintiffs' Supplemental Appendix C1, Page 5, Paragraph 17.

At all times in question pertaining to the trash pick ups at the Rasmussons residence located at 11157 Leo Collins, El Paso, Texas, the Sanitation Department collected the trash by coming upon the property of the Rasmussons to retrieve the trash from a "cabana", a permanent fixture attached to the residence; not from curbside. See Plaintiffs' Third Amended Complaint filed March 14, 1997, Paragraph 302. The Court states in its ruling that "several of the Defendants who were involved in trash pickups affied that they kept their eye on the trash from the moment it was picked-up until it was handed off." See Memorandum Opinion and Order, Page 44, Section B. Fourth Amendment. However, Defendant Holland in his affidavit states that "I picked up the residential trash at 11157 Leo Collins, El Paso, Texas on May 13, 1993, June 17, 1993, and on June 28, 1993." See Affidavit of James Holland, dated July 8, 1996, page 2. Holland further testified that the Rasmusson's home is located in a horseshoe configuration and that he waited around the corner, from which location it would not be possible to see the sanitation worker collecting and segregating the garbage. See Deposition of James Holland, January 17, 1997, Page 27, L1-21. Defendant Baker testified that "I observed them picking it [trash] up. It never fleft my sight." See Deposition of Neil Aaron Baker, January 31, 1997, Page 34, L3-7. However, Baker impeached his own testimony later when he said "Sometimes it [trash] came in a garbage bag. Sometimes we would provide the sanitation department garbage bags so that it would be placed in the garbage. The would - we'd meet them at a location and they'd give it to us" See Deposition of Neil Aaron Baker, January 31, 1997, Page 38, L2-7. Therefore, a material factual dispute exists as to whether the defendants went within the curtilage of the property to retrieve trash from the cabana.

33. Moreover, the Court has summarily ignored the Plaintiffs' "Cross Index of Constitutional Violations in Plaintiffs' Third Amended Complaint" which identifies 29 Fourth Amendment violations beginning on or about October 6, 1988 and continuing through May of 1995, when the Rasmussons and Rasmark forced Defendant Frost to return all of the records unlawfully seized on November 19, 1993. The cross index demonstrates that each violation from the first occurred within the two-year statute of limitation of the preceding violation, supporting plaintiffs' continuing violation allegations.

34. THE COURT'S RULING THAT THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE FIFTH AMENDMENT IS CLEAR ERROR OF LAW.

A fair reading of the Plaintiffs' complaint would show that by Defendant Lappe, unknown to the Plaintiffs until April of 1996, entering highly inflammatory and false information into the agency's system of records and from the agency's system of records, composing and sending the highly inflammatory letter of July 26, 1993 to Ford Motor Company and by Defendant Frost procuring the subsequent highly inflammatory meetings between himself, federal Defendant Schroeder, state Defendant Holland and key officials of Ford Motor Company on August 18th and September 24th violated the Plaintiffs' due process and equal protection of the laws as protected by the Fifth and Fourteenth Amendments of the Constitution. The Privacy Act is relevant "other federal law". The congressional findings in support of the Act indicate the breadth of Congressional purpose: "1.2.1. The privacy of an individual is directly affected by the collection, maintenance, use and dissemination of personal information by Federal agencies; . . . 1.2.3. The opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems; 1.2.4. The right to privacy is a personal and fundamental right protected by the Constitution of the United States; and 1.2.5 In order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and

proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies."

35. To accomplish those purposes the Privacy Act provides: "1.3.1. Restrictions on disclosure, and redisclosure, of personally identifiable records; 1.3.2. 'Fair information practices' which required affected agencies to comply with statutory norms for the collection, maintenance, and dissemination of records; 1.3.3. A system for access by individuals to records about themselves, with exceptions; 1.3.4 A system for amendment of records about individuals upon a showing that they are not accurate, relevant, timely, or complete." Clearly, a violation of due process occurred when the Defendants disclosed highly inflammatory information after they knew that such information was false. Defendant Acosta testified that he personally had his FBI counterpart in Detroit, Michigan to subpoena all of the Ford Motor Company records relating to the use of Plaintiff Rasmark Jet Charter, Inc. Defendant Acosta testified that he informed Defendant Frost before he subpoened the records, which was served on Ford in or about January of 1993. The purpose of subpoenaing the records, according to Acosta, was ". . . to get an idea what kind of volume, what kind of money was being generated. And then I made a copy and provided Customs with it. . . What I said was Customs -Customs is more familiar with invoicing and so on because it relates to air - you know, airplanes and that type of stuff and cargo and so on. That's why I gave it to them. Plus, they were doing most of the analysis on the documents anyway. . Well, if I know how much money is actually legitimately being generated by Rasmark, then I can try to corroborate - corroborate through other - other means to see if there is a big difference in number". Acosta went on to testify that he did not find a big difference on the Rasmark invoices. Acosta testified that he received the records two or three months later, in or about April of 1993; that he reviewed the records and found no evidence of irregularities that would lead him to believe any type of kickback scheme or other criminal violation occurred between Rasmark and Gantkessey. See Deposition of Joe Acosta, January 24, 1997, Page 84, L4 - Page 91, L25. Therefore, Defendants Lappe, Frost, Schroeder and Holland knew, or should have known, that the information disclosed in the July 26th letter and

meetings of August 18th and September 24th of 1993 was highly inflammatory and false. Neither did the Defendants ever make any effort to correct the agency system of records, or give any of the Plaintiffs an opportunity to explain any alleged facts before disclosing such highly inflammatory facts to Ford Motor Company, violating the Plaintiffs' due process and equal protection rights as guaranteed by the Fifth and Fourteenth Amendments to the U. S. Constitution. *See Rolf v. City of San Antonio*, 77 F.3d 823, 828 (C.A.5(Tex.)1966).

36. Moreover, In *Siegert* referring to *Paul v. Davis*, 424 U.S. 693 (1976),(where the local police chiefs placed plaintiff's photograph in a "flyer" of "active shoplifters" after being arrested for shoplifting which was eventually dismissed), the ". . . the plaintiff filed suit under 42 U.S.C. § 1983. . . alleging that the officials' actions inflicted a stigma to his reputation that would seriously impair his future employment opportunities, and thus deprived him under color of state law of liberty interests protected by the Fourteenth Amendment. We rejected the plaintiff's claim, holding that injury to reputation by itself was not a "liberty" interest protected under the Fourteenth Amendment. . . our reference to a governmental employer stigmatizing an employee . . . was made in the context of the employer discharging or failing to rehire a plaintiff who claimed a liberty interest under the Fourteenth Amendment. Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation. The facts alleged by Siegert cannot, in the light of our decision in *Paul v. Davis*, be held to state a claim for denial of a constitutional right. . . The alleged defamation was not uttered incident to the termination of Siegert's employment by the hospital, since he voluntarily resigned from his position at the hospital, and the letter was written several weeks later." See *Siegert* at 233, 234.

37. In the present case, unlike in either *Paul v. Davis* or *Siegert* the Plaintiffs allege that subsequent to the July 26, 1993 letter of Defendant Lappe, the August 18, 1993 and September 24, 1993 meetings between Defendants Frost, Schroeder, Holland and the Ford Motor Company, Plaintiff Gantkessy was terminated by Ford Motor Company and the remaining Plaintiffs were terminated by Ford Motor

Company as its primary cargo charter service out of El Paso, Texas. See Plaintiffs' Third Amended Complaint, filed March 14, 1996, Paragraphs 326-334.

38. THE COURT'S RULING THAT THE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER THE FOURTEENTH AMENDMENT IS CLEAR ERROR OF LAW.

39. The Court is respectfully referred to the Plaintiffs' discussion of the First, Fourth and Fifth Amendments in sections A-D above.

40. THE COURT'S RULING THAT ANY CLAIMS BY GANTKESSY ARISING OUT OF THE JULY 26, 1993 LETTER TO FORD MOTOR COMPANY LIE IN TORT IS CLEAR ERROR OF LAW.

41. The Court is respectfully referred to the Plaintiffs' discussion of some of their Fifth Amendment claims in section D above.

42. THE COURT'S RULING THAT ANY AND ALL TORT CLAIMS ASSERTED AGAINST INDIVIDUAL FEDERAL DEFENDANTS ARE TREATED AS TORT CLAIMS AGAINST THE FEDERAL GOVERNMENT UNDER THE FEDERAL TORT CLAIMS ACT IS CLEAR ERROR OF LAW.

43. The Court is respectfully referred to the Plaintiffs' discussion of their First, Fourth and Fifth Amendments claims. Clearly, the Plaintiffs are alleging constitutional torts and not simply common law torts.

44. THE COURT'S RULING THAT ALL LAW ENFORCEMENT DEFENDANTS WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT IS

CLEAR ERROR OF LAW.

45. The Plaintiffs clearly sued all of the federal defendants only in their individual capacity. The Caption of the complaint states after listing all of the federal defendants that they "are sued in their individual capacity." In Paragraph 3 of the complaint the Plaintiffs state ". . . and bring this lawsuit against federal defendants in their individual capacity and private defendants acting under color of law under the Bivens Docrine." The Plaintiffs are not seeking damages pursuant to the FTCA.

46. **THE COURT'S RULING CHARACTERIZING PLAINTIFFS' CLAIMS ONLY AS TORT AND NOT ACTIONABLE UNDER THE FTCA: DEFAMATION AND INTERFERENCE WITH CONTRACTUAL AND EMPLOYMENT RELATIONS IS CLEAR ERROR OF LAW.**

47. See the Plaintiffs' discussion of their First, Fourth and Fifth Amendment cliams.

48. **THE COURT'S RULING CHARACTERIZING PLAINTIFFS' CLAIM ONLY AS ABUSE OF PROCESS NOT ACTIONABLE UNDER FTCA FOR FAILURE TO MEET JURISDICTIONAL PREREQUISITES IS CLEAR ERROR OF LAW.**

49. See the Plaintiffs' discussion of their First, Fourth and Fifth Amendment cliams.

50. **THE COURT'S RULING THAT THE PLAINTIFFS' HAVE FAILED TO STATE A CLAIM AGAINST EITHER THE CITY OR COUNTY OF EL PASO UNDER § 1983 IS CLEAR ERROR OF LAW.**

51. A motion to dismiss an action for failure to state a claim

"admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts." *Crowe v. Henry,* 43 F.3d 198 (C.A.5 (La.) 1995), quoting from *Ward v. Hudnell,* 366 F.2d 247, 249 (5th Cir.1966). Dismissal cannot be upheld unless it appears beyond doubt that the plaintiffs would not be entitled to recover under any set of facts that they could prove in support of their claim. *Conley v. Gibson,* 355 U.S. 41, 45-46, (1957); *Worsham v. Pasadena,* 881 F.2d 1336, 1339 (5th Cir.1989). The Plaintiffs have alleged that both the City and County of El Paso have adopted the policy as set forth in the "Policies and Procedures Employee's Manual/Handbook, El Paso County Metro Narcotics Task Force-Financial Disruption Unit. The fact that all of the defendants' home agency is listed as a member of the El Paso County Metro Narcotics Task Force-Financial Disruption Unit and each home agency is a member of each other's respective task forces supports the Plaintiffs' allegation that the policy in question is either officially adopted, ratified or acquiesced to by policy making authority for each home agency. At the very least the policy of secrecy can be construed as a custom, in conjunction with the custom of letting the federal agents take over all multi-agencies task force even though the city or county has the right to be the lead agency as well. Specifically, Sheriff Leo Samaniego states that "[a]s part of my efforts towards combating the growing drug trade invading in El Paso County, I agreed to assign officers Jerry Keith and Neil Baker to a task force comprised of law enforcement officers from various agencies. The task force was organized and directed by federal law enforcement agencies and officers. No officer of the El Paso County Sheriff's Department had a supervisory role within this task force." See Affidavit of Leo Samaniego, Paragraph 2. The fact that Defendant Holland states he was assigned to the task presumably by the City demonstrates that he was enforcing a city policy of participating on multi-agency task force. Furthermore, the Plaintiffs also allege that the enforcement of the policy of secrecy resulted in constitutional violations of the Plaintiffs' rights, in that the respective officers were forbidden to discuss their task force activities with their home agency supervisor. This policy of secrecy led to failure to supervise and the city and county knew, or should have known, that such failure would lead to constitutional violations. Defendant Baker testified to wanting to transfer because he was tired of

the pressure. Baker testified that ". . . [t]he pressure I was getting is I had a supervisor over here [task force]. And my supervisor from the sheriff's department and the supervisor from Customs, they had a personality conflict. And I am in the middle. I'm being told by this gentleman here to do one thing and I'm told by this gentleman here to do another thing. Well, after a while, you get in the middle and you want out. And I requested to be taken out." See Deposition of Neil Aaron Baker, Page 69, L9-22. In further support of the Plaintiffs' claim that this policy or custom of secrecy exist, Defendant Holland testified about his supervisor attending a few meetings early on; that "they asked me for things, but they knew there were things that I could not discuss with them which I testified to previously because of Grand Jury secrecy, right? So, there are some things I couldn't talk to them, but they did at one time ask for a report once in a while as to, 'Is everything still going? Are you still working? Do they still need you,' that type." See Deposition of James Holland, Page 81, L7 - Page 82, L25. Therefore, the Plaintiffs have presented substantial fact questions, and as a matter of law, the defendants' summary judgment should be denied.

52. **THE COURT'S RULING THAT PLAINTIFFS' CLAIMS AGAINST DEFENDANT BEACH AND HINES ARE UNTIMELY, ALTERNATIVELY, ARE BARRED BY 19 U.S.C. § 507(b).**

53. Because of the lack of full discovery, the Plaintiffs were unable to obtain all of the dates for each contact between Beach, Hines and the federal and state defendants. Therefore, a fact question exist as to when the statute of limitations began to run. Section 507(b) requires "good faith". Defendants Beach and Hines have failed to demonstrate that they were acting in good faith when they knew they were providing rumors and/or gossip information to customs agents. Defendant Beach and Hines' credibility are in question because of their natural bias resulting from being a fierce competitor of the Rasmusson and Rasmark--getting rid of Rasmark as a competitor would directly increase their bottom line.

54. **THE COURT'S RULING ALL INDIVIDUAL**

DEFENDANTS, OTHER THAN BEACH AND HINES, ARE ENTITLED TO QUALIFIED IMMUNITY IS CLEAR ERROR OF LAW.

55. See the Plaintiffs previous discussion of their First, Fourth, Fifth, and Fourteenth amendment claims.

56. **THE COURT'S RULING THAT PLAINTIFFS CLAIMS AGAINST MANY OF THE DEFENDANTS WERE UNTIMELY BROUGHT IS CLEAR ERROR OF LAW.**

57. See the Plaintiffs "Cross Index of Constitutional Violations in Plaintiffs' Third Amended Complaint" where the plaintiffs show based on continuing violation that all their claims fall within the statute of limitations.

"On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors. By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a

cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

58. In the present case, the Court's Opinion misstates the Supreme Court's holding in *Harlow*. No where does *Harlow* state that "[o]nce a government official or employee has asserted qualified immunity and established that the allegedly wrongful acts were undertaken within the scope of his discretionary authority, the burden shifts to the party seeking damages to show that qualified immunity does not bar recovery." What the Supreme Court did say is that "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained."

59. The threshold inquiry in the determination of a qualified immunity claim is whether the Plaintiffs allege the violation of a clearly established constitutional right. The present Court admits in its own Opinion that the Plaintiffs have met the threshold inquiry. See Memorandum Opinion and Order, Page 13 where it states "[h]ere, Plaintiffs claim that at various times their First, Fourth, Fifth and Fourteenth Amendment rights were violated. Needless to say, these are clearly established constitutional rights."

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully request the Court to grant Plaintiffs' motion for new trial and a hearing on same.

Respectively submitted,

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